TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 31

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1932

CERTIORARI GRANTED MAY 16, 1932

(36,655)

(36,655)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 31

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, DECEASED. PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1932

[1*] DOCKET No. 32,763.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES:

For Petitioner: FRANK I. FORD, Esq.

For Respondent: F. B. HORNER, Esq.

DOCKET ENTRIES.

1927.

Dec. 7—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 8—Copy of petition served on General Counsel.

1928.

Feb. 6—Answer filed by General Counsel.

Feb. 9—Copy of answer served on taxpayer—Circuit Calendar.

1930.

Mar. 15—Hearing set May 26, 1930, San Francisco, Calif.

May 21—Hearing had at San Francisco, Calif., before H. F. Seawell, Division 4, on motion. Stipulation filed. Briefs due in 90 days.

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*Page-number appearing at the top of page of original certified Transcript of Record.

July 9—Transcript of hearing of May 20, 1930, at San Francisco, Calif., filed.

July 19—Brief filed by General Counsel.

July 26—Brief filed by taxpayer.

Sept. 30—Findings of fact and opinion rendered—H. F. Seawell, Division 4. Judgment will be entered for respondent.

Sept. 30—Decision entered—H. F. Seawell, Division 4.

1931.

Mar. 28—Supersedeas bond for $1500.00 approved and ordered filed.

Mar. 28—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Apr. 13—Proof of service filed.

Apr. 20—Praecipe filed by taxpayer.

Apr. 25—Proof of service of praecipe filed.

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[2] Filed December 7, 1927. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter MT-ET-3660-JPB Calif., dated October 12, 1927, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with a principal office at American Trust Bldg., Petaluma, Calif.

2. The deficiency letter (a copy of which is attached) purports on its face to have been mailed to the taxpayer on October 12, 1927.

3. The taxes in controversy are estate taxes claimed to be accruing on October 5, 1924, and determined under the Revenue Act of 1924, and are less than $10,000.00, to wit:

Deficiency in tax	$ 719.61
Refund claimed	2172.16

4. The determination of taxes contained in the said deficiency letter is based upon the following errors:

[3] (a) The Commissioner of Internal Revenue has determined the gross estate at $287,858.71; the deductions $124,799.79; and the net estate $163,058.92, the tax upon the transfer of which is $2,891.77. The return prepared by Commissioner Agent shows a tax of $2,171.16, and a further deficiency is now claimed in the sum of $719.61.

(b) The Commissioner of Internal Revenue was without authority under the Revenue Act of 1924 to prepare a delinquent return and subject this estate to tax. The Act of 1924 is unconstitutional

in so far as it attempts to tax property, all interest in which the decedent created and transferred prior to the passage of the Revenue Act of 1924 and 1916.

(c) The joint tenacy of M. A. Gwinn and J. H. Gwinn was created in June of 1915 prior to the enactment of Revenue Acts of 1916 and 1924, and there is no taxable transfer on the succession of a joint tenant to property. Each tenant is seised of the whole estate from the first (June of 1915), and no change occurs in his title on the death of his cotenant.

5. The facts upon which the taxpayer relies as to the basis of his appeal are as follows:

(a) Taxpayer did not file a return form 704 or 706 with reference to the property held in joint tenacy by the said M. A. Gwinn (decedent) with J. H. Gwinn for the reason that he was advised by his attorney and by his tax advisor that inasmuch as the joint tenacy in question was created in June, 1915, which time was prior to the enactment of the [4] Revenue Acts of 1916 and 1924 that no return or report was required to be filed. The Revenue Act of 1924 is unconstitutional in so far as it attempts to tax property all interest in which the decedent created and transferred prior to the passage of the Revenue Acts of 1924 and 1916.

(b) For the further reason that both at common law and under the Civil Code of California the legal effect of a joint tenacy is that the title to a joint tenacy does not pass to and vest in the survivor upon the death of his cotenant, but that each tenant is seised of the whole estate from the first, and no

change occurs in his title on the death of his co-tenant.

(c) That, furthermore, taxpayer had terminated the joint ten*a*cy under the laws of the State of California in a proceeding taken in the Superior Court of the State of California, in and for the County of Sonoma, and had secured the certificate of the State Inheritance Appraiser to the effect that no tax was due because of the date of the creating of the joint ten*a*cy antidating the statute.

WHEREFORE, the petitioner prays that this board may hear and redetermine the deficiency herein alleged and to also determine the amount of tax refund due petitioner.

FRANK I. FORD.
FRANK I. FORD,
Counsel for Petitioner, 526–7 Mills Building, San Francisco, Calif.

[5] State of California,
County of Sonoma,—ss.

Personally before me appeared J. H. Gwinn, Beneficiary, Estate of M. A. Gwinn, who stated that he had read the foregoing petition and that the statements therein are true.

(Signed) J. H. GWINN.

Subscribed and sworn to before me this 1st day of December, 1927.

(Signed) W. T. MOONEY,
Notary Public in and for the County of Sonoma, State of California.

[6] Treasury Department,
Washington.
October 12, 1927.

MT-ET-CL.-3660-JPB.
District of 1st California.
Estate of M. A. Gwinn.
Date of Death—October 5, 1924.
Deficiency Tax—$719.61.
J. H. Gwinn, Beneficiary,
Estate of M. A. Gwinn,
Petaluma, California.

Sir: The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of Nov. 10, 1926. The deficiency hereby determined amounts to $719.61, and is fully explained in the attached statement, consisting of one page, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of

Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,
D. H. BLAIR,
Commissioner.

Enclosures:
Statement.
Waiver—Form 890.

[7] MT-ET-Cl.-3660-JPB.
District of 1st California.
Estate of M. A. Gwinn.

The basis of the protest is the alleged unconstitutionality of the Revenue Act of 1924.

As the functions of the Bureau are administrative, the revenue acts must be administered as enacted. Your protest is accordingly rejected in its entirety.

In view of the foregoing, the gross estate is unchanged at $287,858.71; the deductions are $124,799.79, and the net estate is $163,058.92, the tax upon the transfer of which is $2,891.77. As the return shows a tax of $2,172.16, the deficiency is $719.61.

There will be assessed and collected, interest on the deficiency at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

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[8] Filed Feb. 6, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 32,763.

Estate of M. A. GWINN, J. H. GWINN, Beneficiary,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his at-

torney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in the paragraph of the petition numbered 1.

2. Admits the allegations contained in the paragraph of the petition numbered 2.

3. Admits the allegations contained in the paragraph of the petition numbered 3.

4. Denies that the respondent, in determining the deficiency tax, committed error as alleged in the paragraph of the petition numbered 4.

5. Denies the allegations contained in the paragraph of the petition numbered 5.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

[9] WHEREFORE it is prayed that the determination of the Commissioner be approved.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
FRANK T. HORNER,
Special Attorney,
Bureau of Internal Revenue.

FTH/y.
2-2-28.

[10] A true copy.

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

20 B. T. A. ——.

United States Board of Tax Appeals.

DOCKET No. 32,763.

Promulgated September 30, 1930.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

A decedent and her son held property in California as joint tenants since before the Federal estate tax, the decedent dying October 5, 1924. In the circumstances of the instant case and under the applicable provisions of the Revenue Act of 1924, subdivisions (e) and (h) of section 302, *held,* the respondent in computing estate tax committed no error in including one-half the value of the joint estate in the gross estate of the decedent.

FRANK I. FORD, Esq., for the Petitioner.

FRANK T. HORNER, Esq., for the Respondent.

The respondent determined a deficiency in estate tax of $719.61, due to his including in the gross estate of the decedent, Mrs. M. A. Gwinn, one-half of the value of certain property owned by her and her son, J. H. Gwinn, as joint tenants.

The case is submitted on the pleadings and stipulation.

FINDINGS OF FACT.

The petitioner is an individual having his principal office in Petaluma, Cal., of which town the decedent and petitioner were both residents.

[11] The deficiency notice dated and mailed to petitioner October 12, 1927, from which this appeal was taken, was addressed to "J. H. Gwinn, Beneficiary, Estate of M. A. Gwinn, Petaluma, California." J. H. Gwinn is such beneficiary and in actual or constructive possession of the property of the said M. A. Gwinn, who died October 5, 1924.

The gross estate of decedent for Federal estate tax purposes in 1924 as determined by the respondent was $287,858.71; the total deductions allowed in determining the deficiency amounted to $124,799.79; the net estate determined was $163,058.92; the total estate tax determined was $2,891.77, and the return filed for the estate showed a tax liability of $2,172.16, which about March 18, 1927, together with interest thereon of $377.78, was paid.

The respondent determined the value of all the property held as joint tenants by the decedent and the petitioner and then included in the gross estate of the decedent as subject to the Federal estate tax half of the property so held by the two as joint tenants aforesaid, allowing deductions as heretofore stated, and computing the tax on the net estate so determined in accordance with the rates prevailing in the applicable acts, no effort being made to

include anything other than the decedent's half of the total estate held in joint tenancy.

The interest of the decedent in the property, the value of which interest was included in the gross estate of the decedent for Federal estate tax purposes by the respondent, was held by the decedent by virtue of the creation in June, 1915, of an estate in joint tenancy [12] between the decedent and her son, J. H. Gwinn, with the right of survivorship and not as tenants in common, and the decedent and her son contributed equal amounts of property to the said estate in joint tenancy created by them in 1915.

It is agreed between the petitioner and respondent that if the Board determines that property held by the decedent and her son as joint tenants with right of survivorship and not as tenants in common, even though both of the joint tenants contributed equally from their separate estates to the acquisition of the property held as joint tenants, is not subject to the applicable provisions of the Revenue Act of 1924 imposing the Federal estate tax, then there is no deficiency in the estate tax in this case and there has been an overpayment of $2,172.16 principal and $377.78 interest; that if the Board determines that the value of property held by this decedent and her son as joint tenants is subject to the Federal estate tax under applicable provisions of the Revenue Act of 1924 imposing the estate tax, then there is no overpayment of estate tax and in addition thereto there is a deficiency in the estate tax in this case in the amount of $719.61; provided,

however, that both parties to this case reserve all rights to contest by appropriate proceedings in the Court of Appeals the correctness of the determination and decision of the Board in this case.

[13] OPINION.

SEAWELL.—The applicable provisions of the Revenue Act of 1924 are contained in section 302 (e) and (h) and are as follows:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.—
>
> * * * * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or

money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercising, or relinquished before or after the enactment of this act.

[14] The petitioner cites and relies on the case of In re Gurnsey's Estate, 177 Cal. 211, 170 Pac. 402, holding that under the Civil Code of California, as at common law, the legal effect of a joint tenancy is that the title to the joint property does not pass to and vest in the survivor upon the death of the cotenant, but that each is seized of the whole estate from the first and no change occurs in his title on the death of his cotenant.

That case was cited and approved in Carter vs. English, 15 Fed. (2d) 6, and this Board, in Laura F. M. Doe et al., Executors, 18 B. T. A. 427, and Lizzie S. Mastick, 18 B. T. A. 428, was constrained by Carter vs. English, *supra,* to hold that property in California held by a decedent and his wife in joint tenancy since before the estate tax is not included in decedent's gross estate for estate tax purposes.

The case of Carter vs. English, *supra,* arose under the Revenue Act of 1916, and the said two cases before this Board arose under the Revenue Act of 1918. All were from the state of California and involved substantially the same question as that in the instant case which, however, arises under the Revenue Act of 1924. In all of the cases the joint tenancies involved were created, and the titles of the decedents, whose estates were sought to be taxed, were vested, prior to the enactment of the applicable Revenue Act, but not until the Revenue Act of 1924 was there a retroactive feature in any of the Acts as regards the imposition of an estate tax in such cases.

[15] In the instant case, the property involved and held as joint tenants by the decedent and her son, the petitioner herein, was acquired as joint tenants by them in June, 1915, each contributing equal amounts of property to the said estate in joint tenancy. However, no effort is now being made to include anything other than one-half of the value of the total estate held in joint tenancy.

The decedent died October 5, 1924, at which time

the Revenue Act of 1924 was in effect, and under subdivision (h) of section 302 thereof subdivision (e) of section 302 is made specifically retroactive, which brings within the terms of the Act the value of the decedent's interest in the joint estate, regardless of when the joint tenancy was created. In the instant case the tenancy, as heretofore stated, was created in June, 1915, and the value of the decedent's interest in the jointly owned property must be included in her gross estate for purposes of the estate tax, unless the provisions of the Act, when applied to the facts in the instant case, are held unconstitutional.

The respondent, however, does not rely solely upon the specific language of section 302 (e) and (h) of the Revenue Act of 1924 but also upon the decision of the Supreme Court of the United States in Tyler vs. United States, —— U. S. —— (decided May 19, 1930), in which styled case the Court had before it three cases involving the liability for Federal estate tax purposes of property held by the decedent and surviving spouse as tenants by the entirety. In all three [16] cases the Court held the property was subject to the Federal estate tax.

In the Tyler case, *supra,* and the other two cases decided at the same time, the Court points out that the estate by the entireties was created after the passage of the act levying the tax. The Court stated:

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the

> decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

The Court also states that while the survivor had an estate prior to the death of the cotenant, death had the effect of passing to the survivor substantial rights in respect of the property theretofore never enjoyed. "Thus the death of one of the parties to the tenancy became the 'general source' of important and definite accessions to the property rights of the other."

It is true, in the Tyler and other two cases referred to, *supra,* the Supreme Court had under consideration provisions of the Revenue Acts of 1916 and 1921 relative to the impostion of estate tax upon estates by the entirety, whereas here the issue is as to the imposition of an estate tax, under the Revenue Act of 1924, on the interest of a decedent in a joint tenancy created before the passage of the 1924 Revenue Act, the facts in the instant case bringing it squarely within the retroactive provisions of said Act.

[17] There is no substantial difference between the earlier revenue acts mentioned and the Revenue Act of 1924, with respect to joint estates, except that the 1924 Act is specifically retroactive.

The Supreme Court in the Tyler case, *supra,* ap-

pears to have definitely settled the constitutionality of such parts of the revenue acts as impose an estate tax, and since, as therein stated, "the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other," the same basis and occasion for the tax would seem to exist whether the estate in joint tenancy was created before or after the effective date of the revenue act which imposes the tax.

In view of the specific provisions of section 302 (e) and (h) of the Revenue Act of 1924 and the language and reasoning of the Court in its opinion in the Tyler case, *supra,* from which we have only briefly quoted, though much of the reasoning is applicable here, we have no hesitancy in assuming, which in the circumstances of the instant case it is our duty to do, that the Revenue Act of 1924 and its retroactive provisions are constitutional. In the light of the reasoning in the Tyler case, *supra,* and the decision of the Court in Knox et al. vs. McElligott, 258 U. S. 546, we are of the opinion, on the record in the instant case, that the respondent in his determination of a deficiency in estate tax of $719.61 committed no error and his action is accordingly approved.

Judgment will be entered for the respondent.

[18] United States Board of Tax Appeals,
Washington.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the Board's findings of fact and opinion, promulgated September 30, 1930,—

IT IS ORDERED AND DECIDED: That there is a deficiency of $719.61 in estate tax.

Entered Sep. 30, 1930.

(Signed) H. F. SEAWELL,
Member, United States Board Tax Appeals.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

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[19] Filed March 28, 1931. U. S. Board of Tax Appeals.

United States Circuit Court of Appeals for the Ninth Circuit.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR THE REVIEW OF AND APPEAL FROM DECISION OF UNITED STATES BOARD OF TAX APPEALS.

Comes now J. H. Gwinn, Beneficiary of the Estate of M. A. Gwinn, the petitioner above named, and herewith makes and enters his petition for the review of, and appeal from the findings, judgment and decision of the Board of Tax Appeals promulgated on the 30th day of September, 1930, in the case bearing the above caption before the United States Board of Tax Appeals, under Docket No. 32,763, and in support of this petition, alleges as follows, to wit:

First.

The nature of the controversy before the Board of Tax Appeals was the determination of estate taxes claimed to be accruing on October 5, 1924, and determined under the Revenue Act of 1924, to wit: Deficiency in tax of $719.61. (Refund claimed by petitioner $2,172.16.)

This involves the question whether a joint ten-

ancy credited in June. 1915, prior to the passage of the Revenue Act of 1916 and the [20] Revenue Act of 1924, is subject to estate taxes under the applicable provisions of the Revenue Act of 1924, subdivision (e) and (h) of Section 302.

All of the facts in the case at bar have been stipulated, and the findings of fact set forth in paragraphs 1 to 6, inclusive, of the findings of fact of the Board of Tax Appeals, are practically the same as the facts stipulated by counsel for petitioner and counsel for the Commissioner and filed with the Board of Tax Appeals.

Second.

That the petitioner seeks to review and appeal from the findings, judgment and decision of the Board of Tax Appeals in and to the United States Circuit Court of Appeals for the Ninth Circuit, within which circuit is located the office of the Collector of Internal Revenue to whom said petitioner made the estate tax return.

Third.

ASSIGNMENTS OF ERROR.

The errors committed by the Board of Tax Appeals upon which the petitioner relies as a basis for this petition and relies as a basis for this petition and appeal are as follows:

(1) The Board of Tax Appeals erred in upholding the Commissioner of Internal Revenue, respondent herein, in his determination of a deficiency in the amount of $719.61 in the estate taxes of the petitioner under the Revenue Act of 1924.

(2) The Board of Tax Appeals erred in holding that where a joint tenancy is created in June of 1915 prior to passage of the Revenue Act of 1916 1924, the value of the decedent interest in jointly owned property upon her death on October 5, 1924, must be included in her [21] gross estate for purposes of estate tax under the Revenue Act of 1924.

(3) The Board of Tax Appeals erred in holding that under subdivision (h) of Section 302 thereof, subdivision (e) of Section 302 is specifically retroactive regardless when the joint tenancy is created.

(4) The Board of Tax Appeals held in its opinion in the instant case following Carter vs. English, 15 Fed. (2d) 6, which arose under the Revenue Act of 1916, that joint tenancies and the titles of the decedents whose estate were sought to be taxed, created before the passage of the applicable act, were vested, but erred in holding that the retroactive feature of the Revenue Act of 1924 could destroy this vested right of petitioner.

(5) The Board of Tax Appeals erred in following the case of Tyler vs. United States, 281 U. S. 497, as in that case the court distinctly states in Paragraph 5 of the opinion that "in each case the estate was created after the passage of the applicable act; and none of the property constituting it had, prior to its creation, ever belonged to the surviving spouse."

Whereas in the instant case the joint tenancy was created prior to the passage of the Revenue Act of

1916 and 1924, and the Board of Tax Appeals erroneously concludes that the same basis and occasion for the tax would seem to exist whether the joint tenancy was created before or after the effective date of the Revenue Act which imposes the tax.

(6) The Board of Tax Appeals erred in holding the retroactive [22] features of subdivision H of Section 302 of the Revenue Act of 1924 constitutional in so far as it requires that there shall be included in the gross estate under Section 302, (e) R. A. of 1924, the value of property transferred by decedent prior to the passage of the Revenue Acts of 1916 and 1924.

(7) The Board of Tax Appeals erred in rendering the decision for the respondent.

WHEREFORE your petitioner prays that this Honorable Court may review the findings, judgment and decision in this cause, reverse the decision of said Board of Tax Appeals in favor of petitioner that there is no deficiency in estate taxes under the Revenue Act of 1924 and a refund is due petitioner for estate taxes paid in the sum of $2,-172.16, and that this joint tenacy is not subject to the applicable provision of the Revenue Act of 1924, Section 302, subdivision (e) and (h), and for such other and further relief as may to this Court appear proper in the premises.

FRANK I. FORD,
FRANK I. FORD,
Attorney for Petitioner.

[23] State of California,
County of Sonoma,—ss.

J. H. Gwinn, being first duly sworn according to law, upon oath deposes and says that he is the petitioner in the foregoing petition; that he has read the foregoing petition, knows the contents thereof and that the allegations of fact therein are true to the best of his knowledge, information and belief, and that this petition is not filed for purposes of delay and he believes that the petitioner is fully entitled to the relief sought.

J. H. GWINN. (Signed)

Subscribed and sworn to before me this 20 day of March, 1931.

ROBERT A. DOUGLAS, (Signed)
Notary Public in and for the County of Sonoma, State of California.

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[24] Filed Apr. 13, 1931. U. S. Board of Tax Appeals.

United States Circuit Court of Appeals for the Ninth Circuit.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary, Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

NOTICE OF FILING PETITION FOR REVIEW.

General Counsel, Bureau of Internal Revenue,
Washington, D. C.

You are hereby notified that on March 27, 1931, a petition for review of the decision of the United States Board of Tax Appeals was filed with the Clerk of the Board in the above-entitled case, and a true copy of said petition is hereby served upon you.

(Signed) FRANK I. FORD,
Attorney for Petitioner.

Receipt acknowledged this 27th day of March, 1931, of the above notice and copy of the petition for review.

(Signed) C. M. CHAREST,
Attorney for Respondent.

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[25] Filed April 25, 1931. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 32,763.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare the transcript of the record in this cause to be transmitted and delivered by you to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript, and certify as correct, copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.
2. The pleadings before the Board.
3. Findings of fact and the opinion of the Board.
4. Decision (order of redetermination).
5. Petition for review.
6. Notice of filing petition for review.
7. This praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(Signed) FRANK I. FORD,
Attorney for Petitioner.

Receipt acknowledged this 24th day of April, 1931, of the above praecipe for transcript of record.

(Signed) C. M. CHAREST,
Attorney for Respondent.

[26] DOCKET No. 32,763.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CERTIFICATE OF CLERK U. S. BOARD OF TAX APPEALS TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 25, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 12th day of May, A. D. 1931.

[Seal] B. D. GAMBLE,

Clerk.

[Endorsed]: No. 6489. United States Circuit Court of Appeals for the Ninth Circuit. J. H. Gwinn, Beneficiary of the Estate of M. A. Gwinn, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed June 11, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6489

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourteenth day of December, in the year of our Lord one thousand nine hundred and thirty-one. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable WILLIAM P. JAMES, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED petition to review argued by Mr. Frank I. Ford, counsel for the petitioner, and by Mr. Erwin N. Griswold, Special Assistant to the Attorney General, counsel for the respondent, and submitted to the court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the fifth day of January, in the year of our Lord one thousand nine hundred and thirty-

two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable PAUL J. McCORMICK, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Before WILBUR and SAWTELLE, Circuit Judges, and JAMES, District Judge.

JAMES, District Judge.—By this proceeding there is brought here for review a decision of the Board of Tax Appeals, wherein it was determined that one-half of the value of certain real property, held by M. A. Gwinn and petitioner in joint tenancy at and prior to the death of M. A. Gwinn, was sub-

ject to an estate or succession tax under the provisions of the Revenue Act of 1924, approved June 2, 1924 (43 Stat. 303). The joint tenancy was created in June, 1915. Petitioner and M. A. Gwinn, his mother, contributed equal amounts to the purchase of the property. M. A. Gwinn died October 5, 1924. The Revenue Act provides (Sec. 302, subdiv. (e)) that the estate tax shall be determined by including:

> " * * * the extent of the interest therein held as joint tenants by the decedent and any other person * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: Provided, that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person * * * ".

By subdivision (h) of the same section, the provisions quoted are made to apply to all rights and interests,

> "whether made, created, arising, existing, exercising, or relinquished before or after the enactment of this act."

Two questions arise: (1) At the death of his cotenant, did petitioner, by reason of such demise, succeed to or acquire any additional right or interest in the property theretofore held in joint tenancy in 1915? (2) Did the fact that the joint tenancy was created prior to the adoption of the Act of 1924, relieve it from taxation?

The decision of this court in Carter vs. English, 15 Fed. (2d) 6, is relied upon by petitioner as complete authority sustaining his contentions. Carter vs. English took as the ground of decision, that the California Supreme Court had, in Estate of Gurnsey, 177 Cal. 211, held that a joint tenant took his whole estate at the time of the conveyance and no interest could be taxed under a law passed after the creation of the tenancy; that the estate had completely vested prior to the date of the law. While we think that the decision has been completely overturned by later decisions of the Supreme Court of the United States which are hereinafter cited and quoted from, it seems proper to consider just what limitations, if any, the California Statute has placed upon a joint tenancy interest. The California Supreme Court in the Gurnsey case held that

> "each tenant was seized of the whole estate from the first, and no change occurred in his title on the death of his cotenant."

Section 683, Civil Code of California, in defining joint tenancy, makes no change in the character, attributes or incidents which the common law assigned that species of property holding. The unities of title, interest and possession remain affixed. Under

the common law, one of such tenants had not the right to the exclusive possession of the property, and that right accrues to him only upon the death of his cotenant, and his cotenant might destroy the joint tenancy during his lifetime by transfer of his interest; he could also cause partition of the property to be decreed in proportion to interests. Mr. Kent, in his Commentaries (Vol. 4, page 360, 14th Ed.), treating of the subject of joint tenancy, says:

> "A joint tenant in respect to his companion is seized of the whole; but for the purposes of alienation * * * he is seized only of his individual part or proportion."

In Green vs. Skinner, 185 Cal. 435, it is said:

> "It is the law that a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share."

The California court in the Gurnsey case made an important reservation in its holding when it said:

> "The statement in McDougald vs. Boyd, 172 Cal. 753, that the Act of 1911 did not undertake to impose such tax upon the 'right accruing to a surviving joint tenant under the death of his cotenant' is, in our opinion correct."

It is made very plain that the California courts do not view a joint tenancy as conferring upon each tenant complete and irrevocable rights in the joint estate from the date of the inception of the relation. Rights not theretofore possessed must then accrue to the survivor upon the death of his cotenant.

In Tyler vs. United States, 281 U. S., the Supreme Court, under facts there considered, interpreted the purpose and effect of the Federal estate tax law. In that decision the court said:

> "If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.
>
> "The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. * * *
>
> "Before the death of the husband, the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because

of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

The court decided that the Fifth Amendment was not violated as the tax was not so arbitrary and capricious as to amount to confiscation or deprivation of the property without due process of law.

Chase National Bank vs. United States, 278 U. S. 327, had to do with the application of the Federal law imposing an estate tax upon the interest of beneficiaries in insurance policies at the death of the insured. The court held that as the assured retained a right under the policies during his lifetime to surrender and cancel the policies, or pledge them as securities for loans, and otherwise dispose of them for his own benefit, the interest of the beneficiaries becoming for the first time subject to appropriation by them at the death of the assured, the policies should be included among the estate assets and taxed.

In Klein, Administratrix, vs. United States, 283 U. S. 231 (Advance Sheet No. 2), the court was considering an interest, upon which an estate tax was

claimed, arising under a qualified deed given by the husband, decedent, to his wife, and it was there said:

> "It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the later estate into being for the grantee, and effected its transmission from the dead to the living to satisfy the terms of the taxing act and justified the tax imposed."

In Y. M. C. A. vs. Davis, 264 U. S. 47, referring to the estate tax imposed by the Revenue Act of 1918, we find the following expressions of the Supreme Court:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, *but the interest which ceased by reason of the death.*" (Italics supplied.)

The case of Nichols vs. Coolidge, 274 U. S. 531, is not in point, as the facts there considered showed an unrestricted and absolute transfer of property prior to death of a decedent, with no interest, qualified or otherwise, retained by the grantor. There was later considered by the Supreme Court of the United States the effect of the same trust deed involved in the case just cited. Coolidge vs. Long, 282 U. S. 582, and the court there observed:

"* * * The settlers divested themselves of all control over the principal; they had no power to revoke or modify the trust. Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen."

When petitioner's mother died, the interest which she had in the property held in joint tenancy (that interest was a real interest subject, during her lifetime, to be transferred or otherwise terminated), ceased by reason of her death and only because of that event. Hence it was taxable. The interest of petitioner accrued by reason of the event of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy. There is, therefore, present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924. The order is affirmed.

[Endorsed]: Opinion. Filed Jan. 5, 1932. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6489.

J. H. GWINN, Beneficiary of the Estate of M. A. GWINN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT U. S. CIRCUIT COURT OF APPEALS.

Upon Petition to Review an Order of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court, that the order of the said Board of Tax Appeals in this cause be and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered Jan. 5, 1932. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twenty-third day of February, in the year of our Lord one thousand nine hundred and thirty-two. Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of petitioner, filed February 1, 1932, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Frank I. Ford, counsel for the petitioner, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including April 1, 1932; and in the event the petition for a

writ of certiorari to be made by the petitioner herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California, February 24, 1932.

[Endorsed]: Filed Feb. 24, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-two (42) pages, numbered from and including 1 to and including 42, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 9th day of March, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 16, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED

MAR 29 19

In the Supreme Court

of the

United States

October Term, 1931

No. 31

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,

Petitioner;

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals

for the Ninth Circuit

and

BRIEF IN SUPPORT THEREOF.

THADDEUS A. THOMPSON,

301 Corporation Commission Building, Oklahoma City, Oklahoma,

FRANK J. HAAS,

1016 Pacific Southwest Building, Fresno, California,

Attorneys for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No.

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petitioner above named hereby petitions said Court for a writ of certiorari to be directed to the Circuit Court of Appeals for the Ninth Circuit to bring before this Honorable Court the case pending

therein, and entitled: J. H. Gwinn, Beneficiary of the Estate of M. A. Gwinn, Deceased, Petitioner, v. Commissioner of Internal Revenue, Respondent, No. 6489, and in support of said petition respectfully shows:

1.

The case above referred to was brought before the Circuit Court of Appeals for the Ninth Circuit for review of a decision of the United States Board of Tax Appeals upon petition of J. H. Gwinn, beneficiary of the estate of M. A. Gwinn, deceased.

2.

The case above referred to was argued in the Circuit Court of Appeals for the Ninth Circuit and was finally decided by said Court on the 5th day of January, 1932.

3.

The Circuit Court of Appeals for the Ninth Circuit affirmed the order of the Board of Tax Appeals upholding a proposed assessment of estate tax against the petitioner as beneficiary of the property of the estate of M. A. Gwinn, deceased.

4.

The Circuit Court of Appeals for the Ninth Circuit on February 23, 1932, denied a petition for a rehearing on behalf of petitioner. (Tr. 41.)

QUESTION PRESENTED.

Whether, in computing the Federal estate tax of decedent, a resident of the State of California, who died October 5, 1924, (which tax was consequently governed by Section 302 of the Revenue Act of 1924) the Commissioner was justified in including in the gross estate one half of the value of certain property located in the State of California which was held by decedent and her son, the petitioner, as joint tenants with right of survivorship under a joint tenancy created in June, 1915.

REASONS FOR GRANTING THE PETITION.

1. The Circuit Court of Appeals erred in sustaining the decision of the Board of Tax Appeals, that the value of decedent's interest in property owned by decedent and petitioner as joint tenants with the right of survivorship since June, 1915, the date on which the joint tenancy was created, must be included in her gross estate for the purpose of estate tax under the Revenue Act of 1924.

2. The point of law in this case is the same as the question of law decided by the Circuit Court of Appeals for the Ninth Circuit in the case of *Carter v. English,* 15 Fed. (2d) 6. Here we have a different answer to the same question of law.

3. The Circuit Court of Appeals erred in not following *Carter v. English,* supra. *Carter v. English* took as a ground of decision that the California Supreme Court had, in *Estate of Gurnsey,* 177 Cal.

211, held that a joint tenant took his whole estate at the time of the conveyance and no interest could be taxed under a law passed after the creation of the tenancy; that the estate had completely vested prior to the enactment of the law.

4. The decision of the Circuit Court of Appeals is not in harmony with the rulings of this Court in the case of *Tyler v. U. S.*, 281 U. S. 497, and *Phillips v. Dime Trust and Safe Deposit Co.*, 1931 Term No. 3, page 68 U. S. Supreme Court Advance Opinions, 76 L. Ed. The holding in these cases is not authority for the conclusion that under the Revenue Act of 1924 imposing a Federal estate tax, requires inclusion in the gross estate of decedent, decedent's interest in property held jointly by virtue of a joint tenancy created in June, 1915, prior to the passage of the Revenue Acts of 1916 and 1924.

5. The decision in this case is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Lynch v. Congdon et al.*, 1 Fed. (2d) 133. There, as in this case, the joint tenancy involved was created prior to the passage of the Revenue Act of September 8, 1916.

6. The Circuit Court of Appeals for the Tenth Circuit in the case of *Hernandez v. Becker*, 54 Fed. (2d) 542-547, in considering the question whether the wife's interest in community property is an interest held jointly; although dicta, cite *Carter v. English*, supra, and *In re Gurnsey Estate*, supra, as their authority in stating the law on the subject of joint tenancy.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all of the proceedings in this case, numbered on the docket of said Court No. 6489; and that the judgment therein of said Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Dated, San Francisco, California,
March 23, 1932.

Respectfully submitted,
THOMAS A. THATCHER,
FRANK I. FORD,
Attorneys for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No.

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

This is a proceeding to review an opinion of the United States Circuit Court of Appeals for the Ninth Circuit, filed January 5, 1932, found in 54 Fed. (2d) 728. The opinion of said Circuit Court of Appeals affirms the order of the Board of Tax Appeals denying the relief sought by petitioner from a proposed additional assessment of an estate tax. This order

will be found set forth in 20 B. T. A. 1052. Decision promulgated and entered September 30, 1930. Filed March 28, 1931. (Tr. 19.)

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was filed and entered January 5, 1932. (Tr. 40.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Ch. 229, 43 St. 936.)

THE FACTS.

There is no dispute as to the facts. The Board of Tax Appeals found the facts as stipulated by the parties. They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn, deceased, and is in actual or constructive possession of the property of the decedent. Decedent died on October 5, 1924, and at the time of her death was a citizen and resident of Petaluma, State of California.

In June, 1915, the decedent and her son, the petitioner, acquired certain property in California as joint tenants, with the right of survivorship and not as tenants in common, and the decedent and the petitioner contributed equal amounts of property to the estate in joint tenancy so created by them.

In computing the value of the gross estate of the decedent, the respondent determined the value of all of the property held in joint tenancy by the decedent and the petitioner and then included in the gross estate of the decedent half of the value of the property so held. No effort was made to include anything other than the decedent's half of the total estate held in joint tenancy.

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61.

SPECIFICATIONS OF ERROR.

The position of the government on the question of law involved in this case has been an inconsistent one and the question is now further complicated by the decision of the Circuit Court of Appeals in the instant case.

The Treasury Department Regulations have not been uniform on the question of law here under consideration. At first the Department applied the statute to all tenancies whenever created. Regulations 68, issued under the Revenue Act of 1924, merely copied Section 302 (h) of that Act. On November 23, 1928, Treasury Decision 4248 was promulgated,

amending Regulations 68 (issued under 1924 Act) and Regulations 70 (issued under 1926 Act), providing that the taxing statute did not apply to joint tenancies created before September 8, 1916. But on July 3, 1930, after the decision of the Supreme Court in the case of *Tyler v. United States,* 281 U. S. 497, Treasury Decisions 4293, 4294 and 4295 were promulgated. Treasury Decision 4293 amended Article 27, Regulations 37 (issued under 1918 Act) and Article 23, Regulations 63 (issued under 1921 Act). Treasury Decision 4294 amended Article 22, Regulations 68 (issued under 1924 Act) and Treasury Decision 4295 amended Article 22, Regulations 70 (issued under 1926 Act).

The effect of these decisions was to revoke the earlier ruling and in effect provided that all joint ownerships were subject to the tax regardless of the time when they were created. These regulations are still in effect.

The cases of *Doe Estate,* 18 B. T. A. 427 and *Mastick Estate,* 18 B. T. A. 428, were decided against the Government.

The Board of Tax Appeals followed the law in the case of *Carter v. English* (C. C. A. 9), 15 Fed. (2d) 6, holding the gross estate of the deceased husband does not include California property held in joint tenancy by husband and wife and acquired before the enactment of the first taxing statute.

The appeals taken by the Government, after the decision of *Tyler v. United States,* supra, were dismissed. *Doe Estate,* 18 B. T. A. 427; appeal dismissed

(C. C. A. 9) 48 Fed. (2d) 1071. *Mastick Estate,* 18 B. T. A. 428; appeal dismissed (C. C. A. 9) 48 Fed. (2d) 1071.

The Circuit Court of Appeals for the Ninth Circuit in its opinion in the instant case, now thinks that the case of *Carter v. English,* supra, has been completely overturned by the later decisions of the Supreme Court of the United States.

The Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

(a) The Court erred in failing to hold that a joint tenancy, created in June, 1915 prior to the first taxing statute, gave to each tenant a present joint ownership in the whole property, that there was no change in title and no transfer by reason of the death of decedent; that the estate had completely vested prior to the date of the law.

(b) The Court erred in holding that the right accruing to a surviving joint tenant upon the death of his cotenant in a joint tenancy created prior to the first State and Federal taxing statute, accrued by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

(c) The Court erred in failing to hold that a joint tenancy created before September 8, 1916, was not created for the purpose of evading Federal estate taxes.

(d) The Court erred in failing to hold that no interest ceased by reason of death or passed to her son.

(e) The Court erred in failing to hold that here there has been taxed and now a further attempt to tax, an interest in property created, transferred, and vested prior to the first taxing statute and therefore the tax is arbitrary and capricious and violates the due process clause of the fifth amendment.

ARGUMENT.

A.

IN A JOINT TENANCY CREATED PRIOR TO THE FIRST TAXING STATUTE, A JOINT TENANT TOOK HIS WHOLE ESTATE AT THE TIME OF THE CONVEYANCE, AND NO INTEREST COULD BE TAXED UNDER A LAW PASSED AFTER THE CREATION OF THE TENANCY; THAT THE ESTATE HAD COMPLETELY VESTED PRIOR TO THE DATE OF THE LAW.

It is well settled law in the State of California, that in a joint tenancy created prior to August 10, 1915, the effective date of the 1915 Inheritance Tax Amendment, an inheritance tax cannot be imposed upon the interest of a decedent, dying after the passage of that act, for the reason that the *Estate of Gurnsey,* 177 Cal. 211, holds that a joint tenant took his whole estate at the time of the conveyance and no interest could be taxed under a law passed after the creation of the tenancy; that the estate had completely vested prior to the date of the first taxing statute.

The law of California, however, is different with respect to a joint tenancy created subsequent to August 10, 1915.

The Legislature of the State of California amended the inheritance tax law by inserting an entirely new

provision with respect to the taxation of joint tenancies, effective August 10, 1915.

Act 4035 B, Section 1, Subdivision G:

> "When any person or persons, either directly or indirectly created any joint tenancy, joint account, joint deposit, or other interest in any property, whereby any right of survivorship is created between such person or persons and any other person or persons, without valuable and adequate consideration therefor, the creation of such joint tenancy, joint account, joint deposit or other interest in such property, with right of survivorship, shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death of the person or persons in this paragraph first mentioned, within the meaning of this act." (Amendment approved May 10, 1915. Statute 1915, page 435.)

The Inheritance Tax Amendment of 1915 holds that the creation of a joint tenancy shall be deemed to be a transfer intended to take in possession or enjoyment at or after the death of the person or persons "in this paragraph first mentioned within the meaning of this act."

Here in California we have two well settled rules of law. With respect to a joint tenancy created prior to the first taxing statute, possession and enjoyment passes at the time of the creation of the joint tenancy, and all of the property remains the property of the survivor, as it was, in contemplation of law, from the time of its creation.

With respect to a joint tenancy created subsequent to August 10, 1915, the effective date of 1915 In-

heritance Tax Amendment, the common law rule is changed for the purpose of levying an inheritance tax. The creation of a joint tenancy shall be deemed to be a transfer intended to take effect in possession and enjoyment, not at time of its creation, but at or after the death of the person or persons first mentioned within the meaning of the Act. The right accruing to the surviving joint tenant under the death of his cotenant is made the subject of a tax by this specific legislation. The law does not apply to joint tenancies created prior to August 10, 1915. The estate of M. A. Gwinn, deceased, was not subject to an inheritance tax, as the joint tenancy was created prior to the first taxing statute.

When Congress enacted Section 201 of the Revenue Act of 1916 imposing a tax on the transfer of the net estate of every decedent dying after the passage of this act, the inclusion of a joint tenancy or a tenancy by the entirety could not be justified by the terms of the statute as no transfer takes place at death in a joint tenancy or a tenancy by the entirety according to the common law rule. So it was, therefore, necessary by specific legislation to bring under Section 202 (c) the taxation of decedent's interest in a joint tenancy or tenancy by the entirety. The common law rule was changed by Congress. The interest of the surviving joint tenant or tenant by the entirety was deemed by Congress to accrue not by reason of the transfer, theretofore made which created the joint ownership, but to accrue by reason of the death of the cotenant. Possession and enjoyment was deemed to take effect at or after death. The property rights ac-

cruing to the surviving joint tenant upon the death of his cotenant was deemed by Congress to be the proper subject of an estate tax to be measured in whole or in part by value of such rights. Congress did in September of 1916 the same thing that the State of California did in August of 1915. It changed the common law rule only for the purpose of levying a tax. It taxed the property rights accruing to the surviving joint tenant under the death of the cotenant.

The Supreme Court of California holds that the question of liability to inheritance taxes must be determined by the law in force at the time title vests in virtue of the transfer. (*Estate of Gurnsey,* supra, citing *Hunt v. Wicht,* 174 Cal. 205.)

When Congress changed the common law rule with respect to possession and enjoyment of a joint tenancy and taxed the property rights accruing to the surviving joint tenant under the death of his cotenant, the tax to be measured in whole or in part by the value of such rights; the statute does not apply to joint tenancies created prior to September 8, 1916, as possession and enjoyment of the whole and the rights accruing to the surviving joint tenant passed at the time title vests in virtue of the transfer.

B.

RIGHTS ACCRUING TO A SURVIVING JOINT TENANT UPON THE DEATH OF HIS COTENANT ARE NOT TAXABLE UNDER FEDERAL STATUTES, IF THE ESTATE VESTS IN VIRTUE OF THE TRANSFER MADE PRIOR TO SEPTEMBER 8, 1916.

The Circuit Court thinks that the law in *Estate of Gurnsey,* supra, is no longer controlling in *Carter v. English,* and *Carter v. English* is overturned by later decisions of the Supreme Court of the United States.

The Circuit Court makes the following holding in the last paragraph of its opinion:

> "The interest of petitioner, held subject to the tax, accrued by reason of the event of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy. There is, therefore, present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924." (54 Fed. (2d) 728-730.)

The above conclusion of law we believe is based upon the following conclusion of the Circuit Court after its discussion of Section 683, Civil Code of California, *Green v. Skinner,* 185 Cal. 435, and *Estate of Gurnsey,* supra.

> "It is made very plain that the California courts do not view a joint tenancy as conferring upon each tenant complete and irrevocable rights in the joint estate from the date of the inception of the relation. Rights not theretofore possessed must then accrue to the survivor upon the death of his cotenant." (*Gwinn v. Commissioner,* 54 Fed. 728, 729.) (Tr. 35.)

The Circuit Court from the above conclusion of law holds that the rights accruing to a surviving joint tenant upon the death of his cotenant, in a joint tenancy created prior to first taxing statute, accrued, by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

Is the above a correct statement of the California law with respect to a joint tenancy created prior to the first taxing statute? We believe this holding to be incorrect. The rights accruing to a surviving joint tenant under the death of his cotenant were not held subject to an inheritance tax, if the joint tenancy was created prior to the first taxing statute. The Supreme Court stated very clearly in the cases of *McDougald v. Boyd,* 172 Cal. 753 (159 Pac. 168), and *Estate of Gurnsey,* supra, that the Inheritance Tax Act of 1911 did not undertake to impose such tax upon the right accruing to a surviving joint tenant upon the death of his cotenant.

> "Some restrictions upon the possession and enjoyment of the donee, other than that arising from the law of joint tenancy was necessary, under the previous acts to bring the transfer within its definitions." (*Estate of Gurnsey,* 177 Cal. 211-216.)

The Inheritance Tax Amendment of 1915 for the first time did place some restrictions upon the possession and enjoyment of the donee. It subjected to inheritance tax the right accruing to a surviving joint tenant upon the death of his cotenant. It changed the common law rule with respect to pos-

session and enjoyment. Possession and enjoyment was now deemed to take effect at or after the death of the cotenant. A transfer was deemed to take place by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

The 1915 Inheritance Tax Amendment, taxing the right accruing to a surviving joint tenant upon the death of his cotenant, has not been applied to joint tenancies created prior to August 10, 1915, in view of the opinion of the Supreme Court of California in *Estate of Gurnsey,* supra, holding that the question of liability to inheritance taxes must be determined by the law in force at the time title vests in virtue of the transfer, citing *Hunt v. Wicht,* 174 Cal. 205.

The Circuit Court of Appeals rightly held in *Carter v. English,* supra, with respect to a joint tenancy created prior to September 8, 1916, that the cessation of decedent's interest or the right accruing to the surviving joint tenant upon the death of his cotenant, was not subject to estate tax under the Revenue Act of 1916.

> "Our judgment is that the will gave to each tenant a present joint ownership in the whole property described in the will; that there was no change of title; and no transfer by reason of the death of Annie Ames." (*Carter v. English,* 15 F. (2d) 6-8 last paragraph.)

The aforegoing clearly shows that with respect to a joint tenancy created prior to the Inheritance Tax Amendment of 1915 and the Revenue Act of Sep-

tember 8, 1916, the transfer takes place at the time of the creation of the joint tenancy. The right accruing to a surviving joint tenant upon the death of his cotenant is not taxable if the joint tenancy was created prior to the first taxing statute.

The Circuit Court is in error when it states "the interest of petitioner, held subject to the tax, accrued by the reason of the event of the death of the cotenant, and not by reason of the transfer theretofore made which created the joint tenancy."

The above is in direct conflict with the decisions of the Supreme Court of California in the *Estate of Gurnsey,* supra, the case of *Carter v. English,* supra, and *Lynch v. Congdon,* 1 F. (2d) 133, with respect to a joint tenancy created prior to the first taxing statute. The rights accruing to a surviving joint tenant upon the death of his cotenant or the cessation of decedent's interest are not subject to estate taxes if the joint tenancy was created prior to the first taxing statute. To subject it to a tax, Congress can disregard the common law rule with respect to the transfer and vesting of the estate, but it cannot apply the law to tenancies created prior to September 8, 1916.

This Court's attention is called to the fact that the words "held subject to the tax" appearing in 54 Fed. (2d) 728 at 730 last paragraph, do not appear in the opinion of the Circuit Court, Transcript of Record, page 39.

The *Tyler* case, supra, held that the rights accruing to the surviving joint tenant upon the death of

his cotenant were the subject of the tax (Tr. 36), and not the ceasing of the power to transfer and terminate the joint tenancy. According to the opinion in the Federal Reporter the interest of decedent is taxed upon both grounds.

C.

1. **A JOINT TENANCY ESTATE CREATED PRIOR TO SEPTEMBER 8, 1916, WAS NOT CREATED FOR THE PURPOSE OF EVADING FEDERAL ESTATE TAXES. SECTION 201 (c) OF THE 1916 ACT AND THE SIMILAR PROVISION OF SECTION 302 (e) OF THE 1924 ACT WERE ENACTED TO PREVENT TAX EVASION.**

In the case of *Tyler v. United States,* 281 U. S. 497, No. 428, the tenancy by the entirety was created in November 1917, decedent died May 7, 1918. 1916 Act applicable. In No. 546 the tenancy by the entirety was created on June 19, 1923, the decedent died August 28, 1923. 1921 Act applicable. In No. 547 decedent died on February 3, 1924. 1921 Act applicable. The facts in 10 B. T. A. 1100 do not state when the estate by the entirety was created. The Supreme Court states all three estate were created after the applicable act.

The facts in the *Tyler* case, supra, however, were different. The estates by the entireties before the Court in the *Tyler* case were created after the passage of the effective revenue act. Here the joint tenancy was created prior to the first estate tax law; the act of September 8, 1916.

There are several outstanding points in the *Tyler* case which we believe show that the *Tyler* case does not apply to joint tenancies created prior to the first estate tax law.

First. The *Tyler* case did not decide the question at issue in this case as it dealt only with tenancies by the entirety created subsequent to September 8, 1916.

Second. It was intimated very strongly in the *Tyler* case that an estate by the entirety would not come within the purview of the general language of Section 201, Revenue Act of 1916, if that section stood alone, and is subject to tax solely because of the specific provisions of Section 202 (c), Revenue Act of 1916.

Third. Congress recognized the fact that there must be a transfer at death in order to impose a tax under Section 201. According to the common law rule, no transfer took place in a joint tenancy or tenancy by the entirety at death. There being no transfer at death no tax could be imposed upon the interest of decedent in a joint tenancy or tenancy by the entirety.

Fourth. It was, therefore, necessary by specific legislation to bring under Section 202 (c) the taxation of decedent's interest in a joint tenancy or tenancy by the entirety. Under Section 202 (c) Congress disregarded the common law rule and subjected to tax the rights accruing to the surviving joint tenant upon the death of his cotenant to be measured in whole or in part by the value of such rights. Congress did in 1916 what the legislature of California did in 1915.

For the purpose of levying a tax it was deemed that the interest of the surviving joint tenant accrued by reason of the death of his cotenant and not by reason of a transfer theretofore made which created the joint tenancy.

Fifth. This Court stated in the opinion that the decisions of the Courts of Maryland and Pennsylvania follow the common law rule and are in accord in respect to the character and incidents of tenancies by the entirety.

> "These decisions establish a state rule of property, by which, of course, this court is bound." *Warburton v. White,* 176 U. S. 484, 496, 205 S. Ct. 404, 44 L. Ed. 555.

The common law rule, adhered to in Pennsylvania and Maryland, that no interest in property held by tenants by the entirety passes to the other upon the death of his cotenant, was not considered to be binding as the tenancies by the entirety were created subsequent to September 8, 1916.

There is nothing invalid in taxing this shifting of economic benefits because it occurred *after* Congress had enacted that such a transaction would be subject to tax. The decision was limited to tenancies created after the passage of the taxing act.

Sixth. The following conclusion of this Court is most important, when considering the instant case.

> "The evident and legitimate aim of Congress was to prevent an avoidance in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the

> property, or whose separate funds had been used to procure it and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end."

Section 202 (c) was enacted to prevent an avoidance of estate taxes by means of the creation of tenancies by the entirety or joint tenancies. If this be true, the statute does not apply to joint tenancies created prior to September 8, 1916, as it is obvious that one cannot be charged with attempting to avoid an estate tax that was not in existence when the joint tenancy was created.

> "Finally, the purpose of Sec. 402 (d), supra, is to prevent tax evasion (Phillips v. Dime Trust & Safe Dep. Co., ... U. S. ....., decided November 23, 1931), and it cannot be seriously contended that community estates are created to avoid federal taxation." *Hernandez v. Becker,* 54 Fed. (2d) 542-549.

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2. IF THE JOINT TENANCY ESTATE IS CREATED SUBSEQUENT TO SEPTEMBER 8, 1916, THE ESTATE TAX IS RIGHTLY LAID. IF THE JOINT TENANCY ESTATE IS CREATED PRIOR TO SEPTEMBER 8, 1916, THE TAX IS WRONGLY LAID.

The case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra, was decided on November 23, 1931. Petitioner's brief was submitted to the Circuit Court prior to November 14, 1931; this case was therefore not considered in the brief, but reference was made to it in the oral argument.

In the *Phillips v. Dime Trust & Safe Deposit Co.* case, supra, the thirteen items of property with respect to which the tax was imposed may be classed in three groups, (1) property held upon tenancies by the entirety created after the effective date of the Revenue Act of 1924, (2) property held upon tenancies by the entirety created after the Revenue Act of 1916 and before the effective date of the Revenue Act of 1924, and (3) bank accounts opened in 1910 in the joint names of decedent and his wife, in which there were deposit balances at the date of his death.

The opinion with respect to Group 3 is of vital importance with respect to the question of law involved in this case. The following is the opinion of the Court with respect to Group 3:

> "Group 3. Although the bank accounts were opened before the passage of the Revenue Act of 1916, the record does not disclose whether the deposits, which were the sources of the credit balances at the time of the decedent's death, were made before or after 1916. If after, the tax was rightly paid, for reasons already stated which support the tax with respect to the items in Group 2."

What are the principal reasons that support the tax with respect to Group 2, referred to in Group 3 of the opinion?

They are as follows: The law in the *Tyler* case and

> "The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as dece-

> dent's estate, relieves the present tax of the objection that it is arbitrarily retroactive." (*Phillips v. Dime T. & S. D. Co.,* supra, Group 2.)

The only conclusion that can be drawn from the above citation is, a tax is arbitrarily retroactive when it is applied to joint tenancies created prior to September 8, 1916. As Section 302, Subdivision (h) of the Revenue Act of 1924 was under consideration with respect to Group 2, therefore, Subdivision (h) is arbitrarily retroactive, when it includes under Subdivision (e) the value of decedent's interest in a joint tenancy created prior to September 8, 1916. If arbitrarily retroactive it offends the Fifth Amendment.

With respect to Group 3, the Court states:

> "If after, the tax was rightly laid, for reasons which support the tax with respect to the items in Group 2."

We have shown the reasons that support the tax with respect to Group 2 apply to Group 3 if the joint estate was created subsequent to September 8, 1916. The holding with respect to Group 3 may be summed up in the following words:

Joint bank accounts created in 1910 are subject to tax where no proof is submitted as to joint deposits outstanding which were made before 1916 Act, and the tax is rightly laid.

The only conclusion that can be drawn from the Court's opinion with respect to Group 3, is that the tax is wrongly laid, if it is shown that the joint tenancy was created prior to September 8, 1916, as

the rights of the parties were vested, as has been shown in this case.

D.

NO INTEREST CEASED BY REASON OF DEATH.

The theory is advanced that it was within the power of the decedent to terminate or transfer the interest in the joint estate, and that power ceased by reason of death and only because of that event. Hence it was taxable.

The three cases in which it was held that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death are:

Saltonstall v. Saltonstall, 276 U. S. 260;
Chase National Bank v. United States, 278 U. S. 327, and
Reinecke v. Northern Trust Co., 278 U. S. 339.

In all the cases cited above it was held that the estate of decedent was taxable, as decedent in his lifetime had exclusive control of the property or trust in question. The trusts were all revocable trusts. The insurance policies were subject to full control of the assured.

These cases are not comparable and do not control with respect to a joint tenancy created prior to the first taxing statute. Revocable trusts controlled by the settlor alone are not in the same category as joint tenancies subject to a joint control.

As was pointed out in *Reinecke v. Northern Trust Co.*, supra:

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

J. H. Gwinn was the only son of decedent and her sole heir at law. The joint tenancy was under his control and management. The only way decedent could terminate the joint tenancy without the consent of her son was by a suit for partition. It is true she might convey her interest to a third party as a gift or for a valuable consideration, but it would be against his and her interests. She was about 86 years old at the time of her death. The interest of the son under this holding of law would be an adverse interest, and for all practical purposes the interest of decedent had passed at the time of the creation of the joint tenancy as if the transfer had been absolute.

Under the facts in this case it is unreasonable to assume that the power to transfer or terminate would ever have been exercised. This contention is not a reasonable one.

One cannot compare a sole tenant with a joint tenant. The sole tenant has exclusive control of his property, a joint tenant is subject to a joint control. A sole tenant is the opposite of a joint tenant. The rule laid down in the three cases cited above applies

only to a sole tenant or settlor with exclusive control of his property or the revocable trusts. The joint tenancy interests of M. A. Gwinn, deceased, were different.

The failure of decedent during her lifetime to give her interest away and thereby sever the joint tenancy and avoid an estate tax, or the failure of decedent to bring an action to partition her son's interest, which would be to her financial detriment and her son's financial detriment; the ceasing of the power to do these things, it is contended is the proper subject of a tax.

In other words a taxpayer must avoid a tax by giving her property away or injure herself financially by severing her joint interest, else her estate is liable for a tax. Such a line of reasoning is illogical when applied to the instant case, as the law does not contemplate that a person must injure oneself in order to comply with the law and do something that is against one's best interest not to do, in order to evade or avoid a tax.

The reason for the rule in *Chase National Bank, Reinecke* and *Saltonstall* cases, supra, is that the sole tenant or settlor had exclusive control of the property or the power to revoke the trusts. In these cases possession and enjoyment of the property by the beneficiaries took place at or after death, hence the estates were taxable.

In the instant case possession and enjoyment of the whole took place in June, 1915, prior to the date of the first taxing statute.

When Congress passed the Revenue Act of 1916 it should have stated in the Act that, if joint tenants who created their joint tenancies prior to September 8, 1916, did not give away their interests or terminate their tenancies by a suit for partition, the interest of a decedent in a joint tenancy created before the Act but dying after the Act would be held subject to a tax.

> "A taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess at the outcome of pending measures." *Untermeyer v. Anderson,* 278 U. S. 440.

There is another reason why the joint estate here involved is not taxable. No estate passed or transferred upon the death of M. A. Gwinn. On the contrary her interest in the joint tenancy upon her death ceased and terminated, and the whole of the joint estate, by virtue of the statute, and the conveyance or transfer of the property to the joint tenancy, belonged to, rather than passed to her son. At the death of M. A. Gwinn no interest in the joint tenancy held by her passed to her son, title thereto having become definitely fixed by the joint tenancy deeds in June of 1915.

The interest which she held immediately prior to her death was obliterated by that event. (*May v. Heiner,* 281 U. S. 238-243.)

The interest of decedent that ceased at death was taxable, was the theory urged by the Government in the case of *Lynch v. Congdon,* 1 Fed. (2d) 133, but it

was not followed by the Eighth Circuit Court of Appeals for the reason that the joint tenancy:

> "gave her (Clara B. Congdon) a present joint ownership of the funds represented by the certificates and the right of sole ownership if she survived him. This transaction was complete before the passage of the act. Unless the act providing for such tax is retrospective in its operation, the tax assessed and collected was invalid. The Supreme Court settled this question as to this very act in Schwab v. Doyle, 258 U. S. 529."

E.

AN ATTEMPT TO TAX AN INTEREST, CREATED, TRANSFERRED, AND VESTED PRIOR TO THE FIRST TAXING STATUTE, IS ARBITRARY AND CAPRICIOUS AND VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Board of Tax Appeals in its decision concludes that in all of the cases (including the instant case) the joint tenancies involved were created, and the titles of the decedents, whose estates were sought to be taxed, were vested, prior to the enactment of the applicable act. (Tr. 15.)

The Circuit Court of Appeals holding that title of petitioner was not vested is in conflict on this point, with the decision of the Supreme Court of California in the case of *Estate of Gurnsey,* 177 Cal. 211-216.

According to the law in the cases of *Estate of Gurnsey,* supra, *Carter v. English,* supra, and *Lynch v. Congdon,* 1 Fed. (2d) 133, the joint tenancies did vest in the survivors prior to the first taxing statute.

The following is applicable here:

> "We see no escape from the conclusion that the interest of the surviving wife, as it is finally determined by the Supreme Court of California, is of a nature that renders it subject to taxation under the plain terms of the Federal Revenue Act." *Talcott v. United States* (C. C. A. 9), 23 Fed. (2d) 897 at 901.

We see no escape from the conclusion that the interest of a decedent in a joint tenancy created prior to first taxing statute, as it is finally determined by the Supreme Court of California, is of a nature that renders it not subject to taxation under the plain terms of the Revenue Act.

The real question at issue in this case is whether Section 302 (h) of the Revenue Act of 1924 is applicable to all joint tenancies whether they are created "before or after the enactment of this Act" and does the application of the Act to joint tenancies created prior to September 8, 1916, violate the "due process" clause of the Fifth Amendment.

The Circuit Court of Appeals avoided this question by holding that "the interest of petitioner held subject to the tax, accrued by reason of the event of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy. There is therefore present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924."

Did the interest of petitioner accrue by reason of the transfer in 1915 or did it accrue by reason of the

death of his cotenant in 1924? The arguments submitted under Sections A and B clearly show that with respect to a joint tenancy created prior to the first taxing statute, the rights accruing to a surviving joint tenant upon the death of his cotenant are not subject to a tax, for the reason that the interest of the surviving joint tenant accrued by reason of the original transfer and not by reason of the death of his cotenant.

This tax is arbitrary and so capricious so as to offend the Fifth Amendment for the following reasons:

When the decedent used her funds to create a joint tenancy with her only son, she, for all practical purposes, made a gift, as fully as if made outright. She was about 77 years old in 1915 and her life expectancy was limited. Her only son was her sole heir at law. The management and control of the property was in the hands of her son. The property rights of the parties having become fixed by reason of the original instrument creating the estate. The joint tenancy was created, transferred, and vested in the survivor prior to September 8, 1916, and that act was consummated before the first taxing statute was passed.

The full legal title vested in the survivor in June of 1915. This is the crucial point in this discussion. The death of petitioner's cotenant in 1924 resulted in no new title or right, but merely relieved petitioner from the further interference of his cotenant. The

transfer in the instant case was fully completed in June, 1915, and was subject to no tax. Yet the value of decedent's interest in that completed transfer, is computed as a part of the estate, and taxed as a transfer in 1924. Hence it follows that the validity of Section 302 (h) Revenue Act of 1924, as applied to this completed transaction cannot be upheld. It is a deprivation of property without due process of law.

The general principle that laws are not to be considered as applying to cases which arose before their passage is held in the case of *Lewellyn v. Frick et al.,* 268 U. S. 238.

All of the foregoing argument, with the citations of law prove one thing: That here there is an attempt on interest that was vested prior to the Revenue Acts of 1916 and 1924 and which interest accrued by reason of the transfer made in June, 1915, prior to the date of the first taxing statute of September 8, 1916.

The following are important cases relating to the question of retroactive operations of estate tax statutes.

Transfer—1916 Act. *Schwab v. Doyle,* 258 U. S. 529, held that the Act was not retroactive as to transfers prior to the first taxing statute in the absence of an express provision.

Insurance—1918 Act. *Lewellyn v. Frick,* 268 U. S. 238. Held that the insurance clause was not retroactive in the absence of a specific provision because constitutional doubts must be avoided.

Transfer—1918. *Nichols v. Coolidge,* 274 U. S. 531. Held that the express retroactive provisions as to transfers in the 1918 Act are invalid, because the construction was arbitrary, unreasonable and not justified by the Act.

We again repeat that it is the creation of the joint tenancy prior to the first taxing statute that determines the rights of the parties and by local law all property rights arise by reason of that instrument and through it. On this question the statutes and rules of decision in California, where the decedent's property is located are controlling. (*De Vaughn v. Hutchinson,* 165 U. S. 566, 17 Supt. Ct. 461.)

This Court has consistently placed its stamp of disapproval on retroactive construction of estate tax statutes save in cases where no other construction was open, owing to the peculiar nature of the estate tax law. Where it appears that a rule of law has been in effect for several hundred years holding that the title of the surviving joint tenant vests at the time of the original grant and not by reason of the death of his cotenant, a change in this rule for the purpose of levying estate taxes, cannot justifiably be applied to joint tenancies created prior to the first taxing statute.

We submit that the matters which have been set forth in the foregoing brief justify, and in fact require, that this Honorable Court grant the accompanying petition for a writ of certiorari, and that upon the hearing of said matter that the decision of

the Circuit Court of Appeals for the Ninth Circuit, affirming the order of the Board of Tax Appeals, be reversed.

Dated, San Francisco, California,
March 23, 1932.

Respectfully submitted,
THOMAS A. THATCHER,
FRANK I. FORD,
Attorneys for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this _____ day of March, 1934.

_____

Attorney General of the United States,

_____

Assistant Attorney General of the United States,

_____

General Counsel of the Bureau of Internal Revenue,

Attorneys for Respondent.

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In the Supreme Court OF THE United States

OCTOBER TERM, 1932

No. 31

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,
Petitioner,

vs.

DAVID BURNETT, Commissioner of Internal Revenue,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

THOMAS A. THACHER,
Balfour Building, San Francisco, California,
FRANK I. FORD,
Mills Building, San Francisco, California,
LLEWELLYN A. LUCE,
Munsey Building, Washington, D. C.,
Attorneys for Petitioner.

RALPH W. SMITH,
Bank of America Building, Los Angeles, California,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 31

J. H. GWINN, Beneficiary of the Estate of M. A. Gwinn, Deceased,
Petitioner,

vs.

DAVID BURNETT, Commissioner of Internal Revenue,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

This is a proceeding to review an opinion of the United States Circuit Court of Appeals for the Ninth Circuit. The opinion of the Circuit Court of Appeals (Tr. 32) reported in 54 Fed. (2d) 728, affirms an order of the Board of Tax Appeals denying petitioner relief from a proposed additional assessment.

JURISDICTION.

The petition filed with the Board of Tax Appeals was heard at San Francisco on May 21, 1930. (Tr. 1.) The decision of the Board of Tax Appeals was promulgated and entered on September 30, 1930 (Tr. 10) and may be found in 20 B. T. A. 1052. Order filed March 28, 1931. (Tr. 19.) The case was brought before the Ninth Circuit Court of Appeals by petition for review filed March 28, 1931 (Tr. 19-24), pursuant to Sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109-110. The judgment of the Circuit Court of Appeals was filed and entered January 5, 1932. (Tr. 40.) A petition for rehearing was denied on February 23, 1932. (Tr. 41.) The petition for a writ of certiorari was filed March 29, 1932, and was granted on May 16, 1932. (Tr. 45.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Ch. 229, 43 Stat. 936.)

QUESTION PRESENTED.

Whether to compute the Federal estate tax of decedent, a resident of the State of California, who died October 5, 1924, (which tax was consequently governed by Section 302 of the Revenue Act of 1924) the Commissioner should include in the gross estate one-half of the value of certain property located in the State of California which was held by decedent and her son, the petitioner, under a joint tenancy with right of survivorship created in June, 1915.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the appendix.

SPECIAL NOTE.

The attention of the Court is called to the fact that the words "held subject to the tax" appearing in 54 Fed. (2d) 728 at 730, last paragraph, do not appear in the opinion of the Circuit Court, Transcript of Record, page 39. The clerk of the Circuit Court states that Judge James must have made this insertion in the opinion sent to the West Publishing Co. According to the opinion in the Federal Reporter the interest of decedent is taxed on two grounds.

A STATEMENT OF THE ESSENTIAL FACTS.

The Board of Tax Appeals found the facts as stipulated by the parties. They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn, deceased, and is in actual or constructive possession of the property of the decedent. Decedent died on October 5, 1924, and at the time of her death was a resident of Petaluma, State of California. (Tr. 11.)

In June, 1915, the decedent and her son, the petitioner, while residing in California acquired certain property as joint tenants, with right of survivorship

and not as tenants in common and the decedent and her son contributed equal amounts of property to the said estate in joint tenancy so created by them in 1915. (Tr. 12.)

In computing the value of the gross estate of the decedent, the respondent determined the value of all of the property held in joint tenancy by the decedent and the petitioner and then included in the gross estate of the decedent as subject to the Federal estate tax, half of the value of the property so held by the two as joint tenants, aforesaid, allowing certain deductions and computing the tax on the net estate so determined in accordance with the rates prevailing in the applicable acts, no effort being made to include anything other than the decedent's half of the total estate held in joint tenancy. (Tr. 11-12.)

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2,172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61. (Tr. 12.)

Upon these facts the Board of Tax Appeals held that half of the value of the property held in joint tenancy by the decedent and the petitioner (her son) must be included in the decedent's gross estate for Federal estate tax purposes, and entered its order that there is a deficiency in Federal estate tax in the sum of $719.61. The Circuit Court of Appeals for

the Ninth Circuit affirmed the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT.

A1. This joint tenancy was created, transferred and vested in survivor in June, 1915. At the time of the transfer there was no law of the State of California imposing any transfer or inheritance tax upon the right accruing to a surviving joint tenant upon the death of his cotenant, neither was there a law of the United States imposing a transfer tax on the creation of joint ownerships nor the rights passing at death. In 1915 the legislature of California, only for the purpose of imposing an inheritance tax, changed the common law rule by deeming that the rights accruing to a surviving joint tenant upon the death of his cotenant accrued by reason of death and not by reason of the transfer, which created the joint tenancy. The Supreme Court of California held that the question of liability to inheritance taxes must be determined by the law in force at the time title vests in virtue of the transfer.

A2. The laws of California are controlling in a Federal Court on all questions regarding the right, title and interests of joint tenants in property, therefore, in order to determine whether the interest of decedent vested in survivor before Congress changed the common law rule on September 8, 1916, the decision of the Supreme Court of California on that question should be binding on this Court.

B. Joint tenancies or tenancies by the entirety did not transmit, transfer or pass at death any interest in property, they, therefore, would not be subject to an estate or transfer tax. Congress in enacting the Estate Tax Act of 1916 found it necessary in order to prevent tax evasion, to specifically include the value of the interest of a decedent in a joint tenancy or tenancy by the entirety under Section 202 (e). Provisions similar to Section 202 (e) were enacted in all subsequent acts. Section 302 (e) is the provision in the 1924 Act.

On September 8, 1916, Congress changed the common law rule for tax purposes only. In all joint ownerships with right of survivorship created after September 8, 1916, the interest of the decedent accrued to the survivor not by reason of the transfer, but by reason of death. The law declared or deemed a taxable transfer, when in fact there was no legal one.

C. The joint tenancy here in question was not created to evade or avoid taxes, being created in June, 1915.

D1. The interest decedent held immediately prior to her death was extinguished by that event. As no interest could be transferred, or terminated at death, no interest ceased or existed at death. Death did not transfer any interest in property to her cotenant. The deed definitely fixed the title thereto.

D2. The right of possession and enjoyment of the whole passed to petitioner at the time of the creation of the joint tenancy. In the three cases, upon which

respondent relies, "possession and enjoyment" of the property passed to the beneficiaries at or after death. These cases have no application here.

D3. A transfer made subject to a power of revocation in the transferor, terminable at death and to take effect at or after death, must be distinguished from a transfer made subject to a power of revocation in the transferor which must be exercised during lifetime and cannot be exercised at death or to take effect at or after death.

In the former case, the power ceases at death. In the latter, there is no power at death, it ceased immediately prior thereto.

E1. This Court by implication has already construed the word "before" in Section 302 (h) Act of 1924 to mean before June 2, 1924, to September 8, 1916. Respondent construes it to mean regardless of when created.

E2. The tax imposed was invalid and the present tax is invalid. It is not an excise or transfer tax, but is a tax on property. There was no transfer at death, neither was this estate included in the class of estates wherein a transfer was deemed to take place at death by a special provision, in order to prevent tax evasion by the creation of such tenancies subsequent to September 8, 1916.

The statute as construed by respondent is therefore arbitrarily retroactive and it offends the Fifth Amendment. The tax imposed (and the present tax),

being a tax on property and a direct tax, must be apportioned as the Constitution directs.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

(a) The Court erred in failing to hold that a joint tenancy, created in June, 1915, prior to the first taxing statute, gave to each tenant a present joint ownership in the whole property, that there was no change in title and no transfer by reason of the death of decedent; that the estate had completely vested prior to the date of the law.

(b) The Court erred in holding that the right accruing to a surviving joint tenant upon the death of his cotenant in a joint tenancy created prior to the first State and Federal taxing statute, accrued by reason of the death of the cotenant and not by reason of the transfer theretofore made which created the joint tenancy.

(c) The Court erred in failing to hold that a joint tenancy created before September 8, 1916, was not created for the purpose of evading Federal estate taxes.

(d) The Court erred in failing to hold that no interest ceased by reason of death or passed to her son.

(e) The Court erred in failing to hold that here there has been taxed and now a further attempt to

tax, an interest in property created, transferred, and vested in survivor prior to the first taxing statute and, therefore, the tax is arbitrary and capricious and violates the due process clause of the Fifth Amendment.

ARGUMENT.

A.

1. BOTH AT COMMON LAW AND UNDER THE CIVIL CODE OF CALIFORNIA THE LEGAL EFFECT OF A JOINT TENANCY IS THAT THE TITLE TO THE JOINT PROPERTY DOES NOT PASS TO AND VEST IN THE SURVIVOR, UPON THE DEATH OF HIS COTENANT, BUT THAT EACH IS SEIZED OF THE WHOLE ESTATE FROM THE FIRST, AND NO CHANGE OCCURS IN HIS TITLE ON THE DEATH OF HIS COTENANT.

The highest Court of the State of California had before it in the *Estate of Gurnsey,* 177 Calif. 211, the question whether property held in joint tenancy is subject to the payment of an inheritance tax. The joint tenancy in question was created on April 11, 1911. Gurnsey died on February 9, 1915. The inheritance tax statutes enacted prior to the year 1915 did not specifically subject to a tax the interest of a decedent in a joint tenancy or the right accruing to a surviving joint tenant upon the death of his cotenant.

In May of 1915 the legislature of the State of California amended the inheritance tax law by inserting an entirely new provision with respect to the taxation of joint tenancies. This amendment was effective

August 10, 1915, 90 days after its approval, and read as follows:

Act 4035B Section 1, Subdivision G:

> "When any person or persons, either directly or indirectly create any joint tenancy, joint account, joint deposit, or other interest in any property, whereby any right of survivorship is created between such person or persons and any other person or persons, without valuable and adequate consideration therefor, the creation of such joint tenancy, joint account, joint deposit or other interest in such property, with right of survivorship, shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death of the person or persons in this paragraph first mentioned, within the meaning of this act." (Amendment approved May 10, 1915. Statute 1915, page 435.) (Repealed 1917.)

In determining whether the joint tenancy in the *Gurnsey* case, supra, was subject to an inheritance tax under the statute the Court said:

> "The argument of the controller is that the creation of a joint deposit by a husband and wife out of money which was previously community property, is in legal effect a transfer of property to vest in the other upon the death of either; that the intent of the husband in the creation of this deposit is conclusively presumed to have been to transfer the property to his wife, to take effect in possession and enjoyment by her, at his death.

"This question was under consideration by this court in *McDougald v. Boyd,* 172 Cal. 753 (159 Pac. 168), where a joint account was created by a husband and wife in a manner substantially the same as here. The court said: 'Mrs. Boyd did not take any interest in the deposits as heir of or successor to her deceased husband. She took by virtue of her estate originating at the time of the creation of the joint tenancies. The imposition of the tax cannot, therefore, be sustained upon theory that the deposits formed a part of the estate of Colin M. Boyd, passing upon his death to his wife. Boyd died on March 13, 1912. The inheritance tax statute then in force was the act approved April 7, 1911 (Stats. 1911, p. 713), and this act did not undertake to impose a tax on the right accruing to a surviving joint tenant upon the death of his co-tenant.' The act of 1911, so far as that subject is concerned is similar to the act of 1905, upon which the present case depends. The joint tenancy referred to in the Civil Code (sec. 683), and here involved, is the estate known as such at common law. In Kennedy v. McMurray, 169 Cal. 287, (Ann. Cas. 1916D, 515, 146 Pac. 647) we held that a joint deposit account made in the same manner as the account here involved, created a joint tenancy, and that such deposit was no part of the estate of the party who first died. In Estate of Harris, 169 Cal. 725, (147 Pac. 967), the court decided that a joint tenancy in personal property could be created by parol, and that 'upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship

and in virtue of the original grant creating the tenancy.' In Hannon v. Southern Pac. R. Co., 12 Cal. App. 350, 355, (107 Pac. 335), the subject was treated at greater length. It was there shown that, at common law, the title to the joint property did not pass to and 'vest in the survivor' upon the death of his cotenant, but that 'each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his cotenant'; that 'it simply "remained" to him,' and came to him 'wholly from the original grant,' so that after the death of one, the other, in pleading his title, could allege a conveyance by the original grantor to himself, without mention of the cotenant, citing Coke on Littleton, Section 286, and 1 Washburn on Real Property, page 646, and concluding with the following: 'It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the cotenant; or that it descends to him from his cotenant; for it had already vested in him by, and at the time of, the original grant.' This is the legal effect of a joint tenancy at common law and under our code, and it would, of course, prevail without regard to the actual intent of the donor who created it. The inheritance tax law, prior to 1915, imposed such tax upon transfers by gift, 'Intended to take effect in possession and enjoyment' by the donee, only at or after the death of the donor. A transfer to joint tenants, without other conditions, does not come within that description, for, as above shown, it gives to the donee immediately the title and the right of possession and enjoyment of the whole, and he succeeds to no new title or right upon

the death of his cotenant, but is merely relieved thereby from the further interference of the cotenant. The legislature of 1915 was evidently of the same opinion. The act of 1915 declares that deposits to joint account of the donor and donee, in joint tenancy, 'shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death' of the donor. (Stats. 1915, p. 436.) The statement in McDougald v. Boyd, 172 Cal. 753, (159 Pac. 168), that the act of 1911 did not undertake to impose such tax upon the 'right accruing to a surviving joint tenant upon the death of his cotenant,' is, in our opinion, correct. Some restriction upon the possession and enjoyment of the donee, other than that arising from the law of joint tenancy was necessary, under the previous acts, to bring the transfer within its definition."

* * * * * * *

"Upon the death of either the property remained, and all of it remained, the property of the survivor, as it was, in contemplation of law, from the time of its creation." Estate of Gurnsey, 177 Cal. 211 at 217."

* * * * * * *

"The rule on the subject is that the question of liability to inheritance taxes must be determined by the law in force at the time the title vests in virtue of the transfer. (Hunt v. Wicht, 174 Cal. 205, (L. R. A. 1917C, 961, 162 Pac. 639).") Estate of Gurnsey, 177 Cal. 211-214.

The case of *Atty. Gen. v. Clark*, 222 Mass. 291, 110 N. E. 299, as to the facts are almost identical with the *Gwinn* case with the exception of the dates. The

opinion in its conclusions of law is similar to the decision of *Estate of Gurnsey,* supra:

> "Joint tenancy arises under the common law, and the doctrine of survivorship thereunder grows out of the application of common law principles wholly independent of statutes. Joint tenants hold under the conveyance or instrument by which the tenancy is created" * * *
>
> * * * * * * *
>
> "Mary M. Clark and her sister, Elizabeth, as joint tenants held under a tenure which would give the survivor the whole if there was no alienation thereof by either party. Upon the death of Elizabeth, Mary as her survivor, took the whole estate, not by descent as the heir at law of her sister or under the laws regulating intestate succession, but as the sole surviving joint tenant. In accordance with the stipulation of the parties, let the entry be: Information dismissed with costs."

The law of California is thereby settled:

(a) With respect to a joint tenancy created prior to the first statute imposing a tax, the title vests in the survivor by virtue of the original grant; possession or enjoyment of the whole passes at the time of the creation of the joint tenancy; and all of the property remains the property of the survivor, as it was, in contemplation of law, from the time of its creation. The statute is not retroactive. Such a joint tenancy is not subject to a tax.

(b) With respect to a joint tenancy created subsequent to August 10, 1915, the rule is different. Only for the purpose of levying an inheritance tax is the

common law rule changed. The creation of a joint tenancy subsequent to August 10, 1915, shall be deemed to be a transfer intended to take effect in possession or enjoyment, not at the time of its creation, but at or after the death of the person or persons first mentioned, within the meaning of the Act. The right accruing to the surviving joint tenant upon the death of his cotenant is made the subject of a tax by this specific legislation.

The estate of M. A. Gwinn, deceased, was not subject to an inheritance tax, as the joint tenancy was created prior to August 10, 1915, the effective date of the first statute imposing a tax on joint tenancies.

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2. PROPERTY IN CALIFORNIA HELD BY A DECEDENT AND HER SON IN JOINT TENANCY SINCE BEFORE THE FIRST ESTATE TAX LAW IS NOT TO BE INCLUDED IN DECEDENT'S GROSS ESTATE.

When Congress enacted the Revenue Act of 1916 (39 Stat. L. 777), Section 201 imposed a tax upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States. It was apparent that Section 201 did not include joint tenancies or tenancies by the entirety for the reason that no transfer takes place at death in a joint tenancy or tenancy by the entirety according to the common law rule. There being no transfer, no tax could be imposed, as the tax was imposed on the transfer. So it was, therefore, necessary to enact Section 202 (c) and to

specifically include under this section the taxation of the interest of a decedent in a joint tenancy or a tenancy by the entirety, and bring it within the reach of the words imposing the tax.

Tyler v. United States, 281 U. S. 497-502:

> "Section 201 imposes the tax 'upon the transfer of the net estate'; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute. But section 202 definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present."

What did Congress do when it enacted Section 202 (C) of the Revenue Act of 1916? It changed the common law rule only for the purpose of levying an estate tax upon the value of the interest of a decedent in a joint tenancy or tenancy by the entirety. The interest of the surviving joint tenant or tenant by the entirety was declared or deemed by Congress to accrue not by reason of the transfer, theretofore made which created the joint ownership, but to accrue by reason of the death of the cotenant. The right of possession and enjoyment of the whole was declared or deemed by Congress not to take effect at the time of the creation of the joint ownership, but to take effect at or after the death of decedent. The property rights accruing to surviving joint tenant upon the death of his cotenant was declared or deemed

by Congress to be the proper subject of an estate tax to be measured in whole or part by the value of such rights.

The Legislature of the State of California in August of 1915, subjected to an inheritance tax the right accruing to a surviving joint tenant upon the death or his cotenant by declaring that the creation of a joint tenancy shall be deemed to be a transfer intended to take effect in possession or enjoyment at or after the death of the donor.

Congress in September of 1916 accomplished the same objective in a different manner. It subjected to an estate tax the property rights accruing to a surviving joint tenant upon the death of his cotenant, to be measured in whole or in part by the value of such rights, by declaring that the gross estate of a decedent shall include the value of, to the extent of the interest therein, property held jointly or as tenants by the entirety, and a tax is imposed upon a transfer of such rights.

Although not expressly stated, the Act of 1916, declared or deemed that a transfer of property rights to the surviving joint tenant, accrued by reason of death and not by reason of the transfer, which created the joint tenancy. The several reasons the Supreme Court of California stated in *Estate of Gurnsey,* supra, with respect to the taxation of the interest of a decedent in a joint tenancy created prior to August 10, 1915, apply here with equal force to a

joint tenancy created prior to the first federal taxing statute of September 8, 1916.

The interest of decedents in joint tenancies created prior to September 8, 1916, under the laws of California were held not subject to estate tax under the 1916 Act and the 1918 Act due to the fact that the estate vested in survivor prior to September 8, 1916. (*Carter v. English,* 15 F. (2d) 6 (C. C. A. 9); *Doe Estate v. Commissioner,* 18 B. T. A. 427; *Doe Estate,* appeal dismissed C. C. A. 9, 48 F. (2d) 1071; *Mastick Estate v. Commissioner,* 18 B. T. A. 428; *Mastick Estate,* appeal dismissed, C. C. A. 9, 48 F. (2d) 1071.)

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3. AS ALL PARTIES TO THE INSTRUMENTS CREATING THE JOINT TENANCY RESIDED IN THE STATE OF CALIFORNIA, AND THE INSTRUMENTS WERE DELIVERED THERE AND THE PROPERTY TRANSFERRED WAS THERE, THE LAW OF THAT STATE IS CONTROLLING ON ALL QUESTIONS INVOLVING THE RIGHT, TITLE AND INTEREST THEREIN.

The right to dispose of property by will, as well as the right to own and grant it is within the control of the states and not of the nation, therefore, in order to determine the time of the vesting of the interest in a joint tenancy and the respective rights of the parties therein, we must look to the laws of the State of California, wherein the principle is well settled that all right, title and interest in the joint estate vests at the time of the creation of the tenancy.

Personal property may be held by two or more persons in joint tenancy. There is no distinction in this respect between real and personal property.

Dennigan v. San Francisco Savings Union, 127 Cal. 142, 59 Pac. 390;

Kennedy v. McMurray, 169 Cal. 287, 146 Pac. 647.

"Joint interest, what. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." Section 683, *Civil Code of California.*

One of the incidents of a joint tenancy is that, upon the death of one of the two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship, and in virtue of the original grants creating the tenancy.

DeWitt v. San Francisco, 2 Cal. 297;

Green v. Blanchard, 40 Cal. 197;

Kennedy v. McMurray, 169 Cal. 287;

Estate of Harris, 169 Cal. 725;

Estate of Gurnsey, 177 Cal. 211;

Hannon v. Southern Pacific R. Co., 12 Cal. App. 356, 107 Pac. 335;

Carter v. English, 15 F. (2d) 6;

Green v. Skinner, 185 Cal. 435.

The petitioner contends that these laws and decisions of the State of California which define and determine from the earliest days down to the time of

the death of M. A. Gwinn, the nature of an estate in joint tenancy and the legal consequences flowing therefrom constitute a rule of real and personal property in the State of California which is binding upon the Federal Courts if the joint tenancy was created prior to September 8, 1916. The Board of Tax Appeals in its decision concludes that in law, the cases, (including the instant case) the joint tenancies involved were created and the title of the decedents whose estates were sought to be taxed were vested prior to the enactment of the applicable act. (Tr. 15.)

Federal Courts are bound by a state rule of property:

> *Jackson v. Chew,* 12 Wheat. 153, 167, 169;
> *Suydam v. Williamson,* 24 How. 427, 433, 434;
> *DeVaughn v. Hutchinson,* 165 U. S. 566, 570;
> *Clarke v. Clarke,* 178 U. S. 186, 191;
> *Warburton v. White,* 176 U. S. 484, 496;
> *United States v. Title Insurance & Trust Co.,* 265 U. S. 472, 486.

In *Talcott v. United States,* 23 F. (2d) 897 (C. C. A. 9), the Court said:

> "We see no escape from the conclusion that the interest of the surviving wife, as it is finally determined by the Supreme Court of California, is of a nature that renders it subject to taxation under the plain terms of the Federal Revenue Act."

In June, 1915, at the time of the creation and vesting of this joint tenancy, it gave to the donee imme-

diately the title and the right of possession and enjoyment of the whole and he succeeds to no new title or right upon the death of his cotenant, but is merely relieved from the further interference of the cotenant. At the time of the transfer there was no law of California nor of the United States imposing a tax upon the rights accruing to a surviving joint tenant upon the death of his cotenant, and this transfer was intended to take effect in possession and enjoyment of the whole in June of 1915.

In the instant case the interest of decedent vested in the survivor prior to August 10, 1915, and according to the decision of the California Supreme Court, *Estate of Gurnsey,* supra, this interest is vested. We submit, that the inclusion of the value of decedent's interest in the gross estate by respondent under the provisions of subdivisions (e) and (h) of Section 302, Revenue Act of 1924 (43 Stat. 303), and the taxation of same under Section 301 of the same act is, therefore arbitrary and so capricious as to offend the due process clause of the Fifth Amendment.

> *Levy v. Wardell,* 258 U. S. 542, 42 S. Ct. 395:
>
> "At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in viola-

tion of the Constitution of the United States, in that it would take property of plaintiff's without due process of law, in violation of the Fifth Amendment, and would not be, besides, a transfer tax or an indirect tax, but would be a direct tax thereon, in violation of article 17, Section 9, subdivision 4, of the Constitution of the United States, because not laid in proper relation to census or enumeration is therein provided."

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4. THE NEW YORK DOCTRINE OF TREATING JOINT TENANCIES AS TENANCIES IN COMMON FOR TAXATION PURPOSES IS NOT APPLICABLE TO A CALIFORNIA JOINT TENANCY.

Respondent in his brief in opposition to the petition for a writ of certiorari in the instant case states (p. 10): "It is plain that there is nothing in *Knox v. McElligot* which is inconsistent with the respondent's position in the instant case." The Board of Tax Appeals in its opinion cites and relies upon the case of *Knox et al. v. McElligot,* 258 U. S. 546. (Tr. 18.)

The case of *Knox v. McElligot,* supra, did not decide the question raised in this case and decided only the question plaintiff in error raised: that the respondent erroneously assessed and collected a tax on one-half of the joint estate that vested in Cornelia B. Kissam prior to September 8, 1916. *Furthermore, Knox v. McElligot, supra, involved only a question of construction,* and *Shwab v. Doyle,* 258 U. S. 529, was the authority for reversing the Circuit Court.

It is true that the Solicitor General in the case of *Knox v. McElligot,* supra, argued as does respondent in this case that *the decision of the jurisdiction in which the joint tenancy was created should not control,* but in the case of *Knox v. McElligot,* supra, the Supreme Court followed the state rule of property and the position of this Court will be inconsistent if it refuses to acknowledge and be bound by the rules of property laid down by the Courts of California or, if it now applies the New York doctrine to a joint tenancy created in the State of California.

It will serve no useful purpose to elaborate upon the basis of the decision of *Knox v. McElligot,* supra, and it will suffice to point out that in New York and California similar statutes were enacted at approximately the same time, imposing a tax upon joint tenancy interests. (See appendix for comparison.) The California statutes have not been given a retroactive application. The State of California, in the exercise of its sovereign power to regulate and control the transmission of property located in that state has definitely determined the status of joint tenancies located in that state. In view of the fact that the status of the joint tenancy property in the instant case was definitely determined before the enactment of the first Federal Estate Tax Act; there is nothing to justify the application of any radical doctrines of foreign states for the solution of this problem and this Court should be bound by the California rule of property.

In *Lederer v. Pearce* (C. C. A. 3) 266 Fed. 497-499, the Court said:

> "From the form of the Federal Estate Tax Act, it is evident the Congress intended that the act should operate not in opposition to but in harmony with the many different state acts with which, because of its very terms, it would come into contact. Lederer v. Northern Trust Co. (C. C. A.) 262 Fed. 52. * * * Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states."

The decision in Baker's Estate (O. C. Phila Co. No. 2100 f. 1931, Phila Legal Intelligencer, September 2, 1932) Pa. 17 D. & C. Ref. 7 is in accord with our contention.

The facts in this case are like the Gwinn case, in that each tenant contributed separate property to the joint tenancy. The Pennsylvania statute quoted in the opinion is similar to the California statutes, which are set forth in the appendix and under Point A. The commonwealth cited *McKelways Estate,* 221 N. Y. 15, 116 N. E. 349, which opinion largely influenced the decision of the District Judge Mayer in *Knox v. McElligot* (not reported). This case held not in point. The opinion in Baker's Estate holds that a joint tenancy agreement is a contract. The case of *Atty. Gen. v. Clark,* supra, holds likewise.

Baker's Estate opinion in effect held that the Act of May 16, 1929 imposing a transfer inheritance tax

upon property held in the joint names of two or more persons is inapplicable to such an estate vested prior to the passage of the statute, although the death of one of the joint tenants occurred thereafter.

Baker's Estate, supra:

> "The rights in the instant case do not pass to the survivor by succession but by reason of the contract of 1927."

B.

RIGHTS ACCRUING TO A SURVIVING JOINT TENANT ACCRUE BY REASON OF THE TRANSFER, WHICH CREATED THE JOINT TENANCY, IF CREATED PRIOR TO SEPTEMBER 8, 1916.

The Circuit Court of Appeals in its opinion in the instant case attempts to justify itself in not following the case of *Carter v. English,* 15 F. (2d) 6, by stating:

> "The California Court in the Gurnsey case made an important reservation in its holding when it said:
>
> 'The statement in McDougald v. Boyd, 172 Cal. 753, that the Act of 1911 did not undertake to impose such tax upon the "right accruing to a surviving joint tenant under the death of his cotenant" is, in our opinion, correct.' " (Tr. 35.)

The Circuit Court failed to include in its opinion the sentence following the above quotation which we believe gives the reason why the Act of 1911 could not impose a tax upon "the right accruing to a surviving joint tenant under the death of his cotenant."

The sentence following is:

> "Some restriction upon the possession and enjoyment of the donee, other than that arising from the law of joint tenancy was necessary, under the previous acts, to bring the transfer within its definition." Estate of Gurnsey, 177 Cal. 211-216.

The above conclusion is an important one for it clearly shows that it was necessary by specific legislation to impose such a tax upon "the right accruing to a surviving joint tenant upon the death of his cotenant." As has been pointed out under Point A of this argument, this Court in the *Tyler* case, supra, stated that the inclusion of such property in the decedent probably could not be justified by the terms of the statute if Section 201 stood alone. But Section 202 definitely includes the property and brings it within reach of the words imposing tax.

Both the Supreme Court of the United States and the Supreme Court of California apparently agree, that, in order that "the right accruing to a surviving joint tenant upon the death of his cotenant," to be subject of a tax, the statute must specifically include such a right in order to bring it within the reach of the words imposing the tax. See *Tyler v. United States,* 281 U. S. 497-502, and *In Re Gurnsey Estate,* 177 Cal. 211-216.

The Supreme Court of California holds that the question of liability to inheritance taxes must be determined by the law in force at the time title vests by virtue of the transfer. (*Estate of Gurnsey,* 177 Cal. 211-214, citing *Hunt v. Wicht,* 174 Cal. 205.)

Therefore, "the right accruing to a surviving joint tenant upon the death of his cotenant" is not subject to estate taxes, if the joint tenancy was created prior to September 8, 1916.

The Circuit Court makes the following holding in the last paragraph of the opinion:

> "The interest of petitioner, held subject to the tax, accrued by reason of the event of the death of the cotenant and not by reason of the transfer, theretofore made which created the joint tenancy." 54 F. (2d) 728-730.

This conclusion of law, we believe to be incorrect with respect to a joint tenancy created prior to September 8, 1916, for the following reasons:

> "By the well established rules of the common law upon the death of one joint tenant the title did not 'vest in the survivor.' The notion of the nature of a joint tenancy entertained by the ancient law writers and jurists was a very peculiar one. The title did not vest or descend upon the death of one tenant. In contemplation of the law each tenant was seised of the whole estate from the first and no change occurred in his title on the death of his cotenant. It simply 'remained' to him. He did not derive the title or estate or any part or interest therein from his cotenant, but wholly from the original grant." *Hannon v. Southern Pac. R. R. Co.,* 12 Cal. App. 350-355. (Extracts from this case are quoted in *Estate of Gurnsey,* supra.)

(The subject of joint tenancy is treated at length in *Hannon v. Southern Pac. R. R. Co.,* supra.)

> "And in Washburn on Real Property, volume 1, page 646, paragraph 14, it is said: 'The interest which a joint tenant has as survivor is not a new one acquired by him from his cotenant upon the latter's death; for his own interest is not changed in amount, but only his cotenant's is extinguished.'" *Hannon v. Southern Pacific R. R. Co.*, 12 Cal. App. 350-356.

The aforegoing clearly shows that the title, right, estate or interest of petitioner did not accrue by reason of the event of the death of the cotenant but accrued by reason of the transfer heretofore made which created the joint tenancy. We submit that we have shown that the premise of Circuit Court cited above is incorrect, therefore, the following conclusion must be in error:

> "There is, therefore, present no attempt to tax an interest made complete and entire prior to the adoption of the Act of 1924."

Rules of law that have been in effect from two to four centuries cannot be lightly cast aside by the Circuit Court of Appeals, and new rules made for the purpose of justifying the imposition of an estate tax. This new rule is a correct one with respect to a joint tenancy created subsequent to September 8, 1916, for the purpose of imposing an estate tax on the value of the interest of decedent accruing to the survivor by reason of the death of his cotenant, but this new rule is not applicable to a joint tenancy created prior to September 8, 1916. The holding that "the interest of petitioner, held subject to the tax, accrued by reason of the event of the death of the

cotenant," is in conflict with the law as expounded by Littleton, Coke, Blackstone and Washburn, and is in direct conflict with the opinion of the Supreme Court of the State of California on this particular subject.

The whole estate continues in the survivor, the same as it would continue in a corporation after the death of one of the incorporators. This has been the settled law for centuries. No good reasons have been set forth in the opinion of the Circuit Court for changing a rule centuries old and construing the new rule to apply to joint tenancies with the right of survivorship regardless of when created. Rights accruing to a surviving joint tenant upon the death of his cotenant, if created prior to September 8, 1916, we claim accrue by reason of the transfer theretofore made, which created the joint tenancy, and all of the aforegoing citations and arguments proves this point.

C.

SECTION 202 (c) OF THE 1916 ACT AND THE SIMILAR PROVISIONS IN THE SUBSEQUENT ACTS INCLUDING SECTION 302 (e) OF THE 1924 ACT WERE ENACTED TO PREVENT TAX AVOIDANCE OR EVASION.

The decision of the Supreme court in the case of *Tyler v. United States,* 281 U. S. 497, did settle one question, that is: the value of the interest of a decedent in a tenancy by the entirety created subsequent to September 8, 1916, no part of which ever belonged to the survivor, is subject to estate taxes under the applicable acts. This decision, however, had the effect

of unsettling questions of law that were considered settled. It caused the Commissioner of Internal Revenue to promulgate on July 3, 1930, Treasury Decisions 4293, 4294 and 4295. ((IX-2) Cumulative Bulletin 425.)

The respondent reversed Treasury Decision 4248, infra, and by way of amendment issued Treasury Decision 4294, infra.

T. D. 4294, infra:

> "The statute extends to joint ownership wherein the right of survivorship exists, regardless of when such joint ownerships were created."

Both the Board of Tax Appeals and the Circuit Court of Appeals in their opinion in the *Gwinn* case cite and rely upon the case of *Tyler v. United States,* supra, as their principal authority. (Tr. 10-Tr. 32.)

Tenancy by the entirety does not exist as a means of property tenure in the State of California.

The facts in the *Tyler* case, supra, are not analogous. There the estates by the entirety under consideration were created after the passage of the applicable revenue act. Here the joint tenancy was created prior to the first estate tax law; the act of September 8, 1916.

The *Tyler* case contains several statements and points of law, which we believe clearly show that this case does not control with respect to a joint tenancy created prior to the first taxing statute.

First. This case dealt only with tenancies by the entirety created subsequent to September 8, 1916, and with respect to all of the estates by the entirety involved in the three cases, this Court said:

> "In each case the estate was created after the passage of the applicable act and none of the property had prior to its creation ever belonged to the surviving spouse."

Second. While it is therein stated that if Section 201 of the Revenue Act of 1916 stood alone it was doubtful whether the terms of the statute included a tenancy by the entirety for the reason that Section 201 imposed a tax on the *transfer* of the net estate. There being no transfer at death in a joint tenancy or tenancy by the entirety, no tax could be imposed, as Section 201 imposed a tax on the transfer.

As previously stated under point A, it was therefore necessary by specific legislation, to bring under Section 202 (c) the taxation of a decedent's interest in a joint tenancy or tenancy by the entirety. Congress changed the common law rule for tax purposes only and subjected to tax the rights accruing to a surviving joint tenant upon the death of his cotenant to be measured in whole or part by the value of such rights.

While it is true that Section 201, Revenue Act of 1916 (39 Stat. 777), imposed a tax upon the transfer of the net estate of every decedent dying after the passage of the act, this case does not specifically provide and it cannot be assumed that Section 202 (c) and the similar provisions of the subsequent acts (including Section 302 (e) and (h) of the 1924 Act) are restrospective in their operation or have any effect on joint tenancy interests created, subsisting and vested prior to September 8, 1916.

While the taxpayers in the *Tyler* case contended that no rights of property were transferred by death,

but the survivor retains only what he already had, following the common law rule and the imposition of a tax would therefore be a direct tax on property and therefore invalid without apportionment. This Court decided that the common law rule did not apply. The tenancies by the entirety were created subsequent to September 8, 1916. Section 202 (c) definitely includes such property and by the inclusion of such estates created after the passage of the act effective at death, no part of which included in the gross estate ever belonged to the survivor, the tax does not *pro tanto* become direct, but is plainly indirect.

There is nothing invalid in taxing this shifting of economic benefits in joint ownerships with right of survivorship created subsequent to September 8, 1916, for there the taxpayers had full knowledge when they created such estates that they would be subject to an estate tax at death. This decision neither directly nor by implication authorizes the application of the taxing statute upon a joint tenancy created prior to September 8, 1916.

Fourth. In the oral argument before the Circuit Court and in the briefs filed, we laid particular stress upon what we thought was the most important part of the *Tyler* case, with reference to the instant case. We contended that Section 201 (c) of the 1916 Act and the similar provisions in the subsequent acts including Section 302 (e) of the 1924 Act were enacted to prevent tax avoidance or evasion.

The Circuit Court's attention was called to the comments on the Tyler decision made by the Supreme Court itself in *Coolidge v. Long,* 282 U. S. 582, and

Phillips v. Dime Trust & Safe Deposit Co., 284 U. S. 160.

In the *Tyler* case, supra, this Court said:

> "The evident and legitimate aim of Congress was to prevent an avoidance in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end."

It is obvious that a statute enacted to prevent tax evasion cannot be applied to a joint tenancy created prior to September 8, 1916. How can one evade or avoid an estate tax by creating a joint tenancy if there was no estate tax law in existence when the joint tenancy was created?

In *Coolidge v. Long*, supra, the question was whether the State of Massachusetts could constitutionally impose an excise tax on succession to property, where the rights had so vested prior to the taking effect of the tax statute, that there was thereafter no occasion in respect of which the excise might constitutionally be imposed. This Court in that case reviewed the case of *Tyler v. United States*, supra, and made the following pertinent statement:

> "It held that the provisions were intended to prevent an avoidance of the estate tax by the creation of such tenancies, and were obviously neither arbitrary nor capricious, and so not violative of the Fifth Amendment."

If similar statutes are retroactively applied as in the instant case, where the joint tenancy was not created to evade or avoid an estate tax and where the rights of the surviving tenant had accrued and vested by reason of the transfer creating the tenancy prior to the enactment of the first taxing statute, then they are arbitrary and capricious and so violative of the Fifth Amendment.

In the case of *Phillips v. Dime Trust & Safe Deposit Co.,* 284 U. S. 160, this Court again reviewed the *Tyler* case, supra, and further explained that the purpose of Section 202 (c) of the Revenue Act of 1916 was to prevent tax evasions by the creation of such tenancies subsequent to September 8, 1916, and taxpayers had knowledge that when they created such tenancies subsequent to September 8, 1916, that the interest of a decedent in such tenancies would be subject to a tax and such a tax is therefore not arbitrarily retroactive.

> "The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedent's estates, was an essential part of the system to prevent evasions, relieves the present tax of the objection that it is arbitrarily retroactive."

The only conclusion that can be drawn from the above citation, when considering the instant case, is that estate tax statutes are arbitrarily retroactive, when made applicable to a joint tenancy created prior to September 8, 1916. As Section 302, Subdivision (h) of the Revenue Act of 1924 was there under con-

sideration with respect to group 2, therefore, Subdivision (h) is arbitrarily retroactive, when it includes under Subdivision (e) (as it does in the instant case) the value of decedent's interest in a joint tenancy created prior to September 8, 1916. This joint tenancy was not created to avoid estate taxes. Decedent and petitioner had no knowledge when this joint tenancy was created, that it was to be embraced within a taxing system that was enacted for the purpose of preventing tax evasion. The present tax is therefore arbitrarily retroactive, and if arbitrarily retroactive it offends the Fifth Amendment.

The case of *Heiner v. Donnan,* 52 S. Ct. 358 was decided on March 21, 1932. Justice Stone, who wrote the dissenting opinion, brings out clearly the point that, we unsuccessfully urged before the Circuit Court, that the decision (in the *Tyler* case) "was rested on the sole and only possible ground," that is: Section 202 (c) of the Revenue Act of 1916 and Section 402 (d) of the Revenue Act of 1921 (which are practically the same as the provisions of Section 302 (e) of the Revenue Act of 1924) were enacted by Congress to prevent tax evasion.

D.

1. THE INTEREST WHICH THE DECEDENT HELD IN THE JOINT TENANCY IMMEDIATELY PRIOR TO HER DEATH WAS EXTINGUISHED BY THAT EVENT.

In view of the fact that this joint tenancy was not created for the purpose of evading or avoiding estate taxes, it therefore does not come within the ambit of

the decision in *Tyler v. United States,* supra. It would appear that this case would fall within the rule laid down in *May v. Heiner,* 281 U. S. 238 for the following reasons:

This joint tenancy was created prior to the act of September 8, 1916, which act changed the common law rule by declaring or deeming that the rights accruing to the surviving joint tenant upon the death of his cotenant accrued by reason of death and not by reason of the transfer, theretofore made which created the joint tenancy. Petitioner, therefore, did not derive the title or estate or any part or interest therein from his cotenant, but wholly from the original grant. No estate passed, ceased or was transferred upon the death of M. A. Gwinn. On the contrary her interest in the joint tenancy upon her death was extinguished by that event and the whole of the joint estate, by virtue of the statute and the conveyance or transfer of the property to the joint tenancy, *belonged to,* rather than passed to her son. (By extinguished we mean to render legally non-existent.) At the death of M. A. Gwinn no interest in the property passed from her to her son; title thereto having become definitely fixed by the joint tenancy deeds made in June 1915. Each owned all of the jointly owned property. No interest ceased or passed at death. Death merely relieved the surviving joint tenant from the further interference of his cotenant, therefore, the deed as joint tenants was sufficient to transfer the property to the petitioner. This case is, therefore, similar to *May v. Heiner,* supra:

"At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. *The interest therein which she possessed immediately prior to her death was obliterated by that event.*" (Italics ours.)

The learned Circuit Court in the instant case made the following holding:

"When petitioner's mother died, the interest which she had in the property held in joint tenancy (that interest was a real interest subject, during her lifetime, to be transferred or otherwise terminated), ceased by reason of her death and only because of that event. Hence it was taxable." (Tr. 39.)

We understand the aforegoing sentence to mean this: The interest of decedent held in the joint tenancy property ceased by reason of her death and only because of that event, for the reason decedent had the power during her lifetime to transfer or terminate her interest. Hence it was taxable.

If the power of decedent to transfer or terminate her interest must be exercised during her lifetime and prior to death, then neither the power to transfer or terminate ceased at death nor did her interest cease at death. If no interest could be transferred or terminated at death, then no interest ceased or existed at death.

Green v. Skinner, 185 Cal. 435-438:

"On the other hand, the severance or attempted severance must take place before the death of such

> cotenant and before the other, as a consequence, has become the owner of the whole by virtue of his right of survivorship. The question in the case stated, therefore, reduces itself into one as to when the deed to the defendant from his grandfather took effect: Was it before or after the latter's death?"

The learned Circuit Court has attempted to apply a principle of law expressed in the cases of *Reinecke v. Northern Trust Co.,* 278 U. S. 339, and *Chase National Bank v. United States,* 278 U. S. 327, to the instant case, "that a transfer, made subject to a power of revocation in the transferor, terminable at death, is not complete until his death." This power is different from a power to transfer or terminate, which must be exercised during lifetime or prior to death, and cannot be exercised at death.

> *Knowlton v. Moore,* 20 S. Ct. 747-754, 178 U. S. 41:
>
> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

Decedent did not have the power to transmit any interest in property by death, nor did petitioner legally receive any interest in property by death.

The case of *Lynch v. Congdon,* 1 Fed. (2d) 133, was decided on a question of construction. The interest of decedent that ceased at death, was taxable, was the

theory urged by the Government, but it was not followed by the Eighth Circuit Court of Appeals for the reason that the joint tenancy:

> "gave her (Clara B. Congdon) a present joint ownership of the funds represented by the certificates and the right of sole ownership if she survived him. This transaction was complete before the passage of the act. Unless the act providing for such tax is retrospective in its operation, the tax assessed and collected was invalid. The Supreme Court settled this question as to this very act in Shwab v. Doyle, 258 U. S. 529."

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2. WHEN THE REASON FOR THE RULE CEASES SO DOES THE RULE.

A new theory of law with respect to the taxation of the interest of decedent in a joint tenancy has been advanced by respondent: This new theory was first advanced by respondent in his brief and argument before the Circuit Court. It has again been advanced by respondent in his brief in opposition to the petition for a writ of certiorari. It is as follows:

> "During the lifetime of the decedent it was within her power to sever the joint tenancy and thus destroy the right of survivorship: the termination of this power on the decedent's death is the proper subject of an estate tax." (Page 4, Brief in opposition.)

The new rule advanced by respondent is founded on the following rule:

> "that a transfer made subject to a form of revocation in the transferor, terminable at his death, is not complete until his death." (Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123-125.)

which is in turn, an enlargement of the following rule of law that was first stated in its present form by this Court in the case of *Saltonstall v. Saltonstall,* 278 U. S. 260, 48 S. Ct. 225-227:

> "A power of appointment reserved by the donor, leaves the transfer, as to him, incomplete and subject to tax."

The imposition of a succession tax in the *Saltonstall* case, supra, was upheld on two grounds: First, the non-exercise of the reserved power in Brooks' lifetime, as the provisions of the trust provided for change or termination by the settlor with the consent of one trustee. This created a power of appointment within the meaning of St. Mass. 1909 C. 527 Sec. 8 and secondly, the interest of the beneficiaries took effect in possession or enjoyment after his death within the meaning of St. Mass. 1916, C. 268, Sec. 1.

In this case we are not concerned with the first ground of the *Saltonstall* case, supra, as it applies only to a power of appointment which is not applicable here. The underlying reason for the tax on the second ground was the fact that the donor never really parted with his gift until death. Only at death did the beneficiaries come into possession or enjoyment of the property. The transfer was therefore incomplete and subject to tax.

The case of *Reinecke v. Northern Trust Co.*, supra, dealt with transfers in trust made prior to the Revenue Act of 1921. In 1903 and 1910 the decedent created two trusts under which the income was reserved to the decedent for life and on his death was to be paid to a certain designated person. However, the decedent reserved to himself a power of revocation of the trusts. Five more trusts were created in 1919. The trustor could not effect any change in the beneficial interests in the trusts without the consent, in the case of four of the trusts, of the single beneficiary of each trust and as the case of one trust, without the consent of the majority so entitled. We are concerned here most with history of the rule and the reasons underlying it. In *Reinecke v. Northern Trust Co.*, supra, the rule was enlarged to include other than transfers under a power of appointment.

> "But in No. 77, Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed.— decided this day, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in Saltonstall v. Saltonstall, 276 U. S. 260-271, 48 S. Ct. 225—72 L. Ed. 565, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death." (49 S. Ct. 123-125.)

The attention of the Court is called to the fact that the respondent in his rule states that the proper subject of an estate tax is the termination of this power.

> "The termination of this power on the decedent's death is the proper subject of an estate tax."

In both *Reinecke v. Northern Trust Co.,* supra, and *Chase National Bank v. United States,* supra, it is the incomplete transfer that is subject of the tax not the termination of the power, although it is stated in *Chase National Bank* case, supra:

> "Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers." 49 S. Ct. 126-128.

But the termination of the power of disposition standing alone could not be the subject of a tax, there must be also the possession and enjoyment of the property transferred to the beneficiaries in order to properly subject the transfer to a tax.

The real question at issue was whether the seven trusts were properly included under the provisions of Section 402 (c) of the Revenue Act of 1921 and subject to the tax imposed by Section 401 of the Revenue Act of 1921. (42 Stat. 277-278.) The taxation of the seven trusts hinged upon the meaning of the following words contained in Section 402 (c) "to take effect in possession and enjoyment at or after death."

The two trusts were held subject to the tax for the reasons that the trust gift was not complete due to the power of revocation, and the transfer held subject to the tax was intended to take effect in possession and enjoyment at or after death.

The five trusts were held not subject to the tax for the reason that the trust gift was complete and "had passed as completely from any control by decedent which might inure to his benefit as if the gift had been absolute." This trust gift in the form of a life estate in one with remainder over to another at or after the donor's death did not fall within the meaning of the phrase in Section 402 (c) "to take effect in possession or enjoyment at or after death."

This Court in *Reinecke v. Northern Trust Co.*, supra, said:

> "In the light of the general purpose of the statute and the language of Section 401 explicitly imposing on net estate of decedents, we think it is at least doubtful whether the trusts or interest in a trust intended to be reached by the phrase in Section 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any other than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under 401. That doubt must be resolved in favor of the taxpayer." 49 S. Ct. 123-126.

The reason for the rule "that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death" is based upon the fact that the transfer held subject to the tax is intended "to take effect in possession and enjoyment at or after death."

This Court in *Coolidge v. Long*, supra (51 S. Ct. 306-310), said:

> "No act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment."

Same case:

> "This court has not sustained any state law imposing an excise tax upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment."

The respondent relies principally upon the cases of *Saltonstall v. Saltonstall,* supra, *Reinecke v. Northern Trust Co.,* supra, and *Chase National Bank v. United States,* supra, where donors made gift *inter vivos,* subject to the power of revocation and the right to change the beneficiary. The real subject of the tax in those cases was the "possession and enjoyment" of the property passing to the beneficiaries at or after death.

These cases have application here, *Estate of Gurnsey,* 177 Cal. 211-216-217:

> "The appellant refers to many cases where gifts and other transfers were made by the decedent in his lifetime, but the control of the property was retained by him, and where from the circumstances the court deduced the conclusion that the transfer was made in contemplation of death, or to take effect in possession and enjoyment after death. *These cases have no application here.* The finding of the court below, upon sufficient evidence to sustain it, that this transfer was

not made in contemplation of death, or to take effect in possession or enjoyment at or after death, excludes the basis upon which these decisions were founded." (Italics ours.)

Attorney General v. Clark, supra:

"It cannot be found that there was a gift of one half of the property to take effect in possession and enjoyment after the decease of the testatrix so as to be taxable under the statutes because the joint tenancy was not severed during the lifetime of the tenants."

The rule, therefore, does not apply to a joint tenancy created prior to September 8, 1916, for the reason that possession and enjoyment of the whole passed to the survivor at the time of the transfer, which created the joint tenancy, and not at or after death.

"Maxims of Jurisprudence, Section 3510 Civil Code of California. When the reason of a rule ceases so should the rule itself. Enacted March 21, 1872, based on Field Draft. N. Y. Civil Code, Section 1965."

It is, therefore, obvious that if the reason for the rule does not exist in a joint tenancy created prior to September 8, 1916, then the rule is not applicable to this case, for when the reason of a rule ceases, so should the rule itself.

3. A TRANSFER TO A JOINT TENANCY, NOT MADE SUBJECT TO THE POWER OF REVOCATION IN THE TRANSFEROR WITHOUT THE CONSENT OF THE BENEFICIARY, AND NOT MADE SUBJECT TO THE POWER TO CHANGE THE BENEFICIARY EFFECTIVE AT OR AFTER DEATH, IS TERMINABLE ONLY PRIOR TO DEATH AND IS COMPLETE AT DEATH.

Chase National Bank v. United States, 278 U. S. 327: This case involved the questions whether the tax imposed by the final clause of Section 402(F) Revenue Act of 1921 (42 Stat. 278) on life insurance policies payable in terms to beneficiaries other than the decedent or his estate is a direct tax on property and void because not apportioned, and whether the tax imposed bears such an unreasonable relation to the subject matter as to render it void.

Section 401 of the Act of 1921 (42 Stat. 278) imposed an estate tax on the net estate, and specifically included under Section 402(F) the amount of life insurance to be received by an executor under policies taken out by decedent, as well as the excess over $40,000.00 received by all other beneficiaries under policies taken out by decedent upon his own life.

The ordinary life insurance policy is similar to a gift under a transfer in trust with the power of revocation. The trustor in a trust may be compared with the insured; the trustee may be compared with the insurer, and the beneficiary may be compared with the beneficiary of a life insurance policy. A life insurance policy, however, cannot be compared with an estate in joint tenancy.

Upon what grounds did this case fall within the following rule governing *Saltonstall v. Saltonstall*, supra?

> "A power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax."

The transfer which was taxed in the *Chase National Bank* case was the termination of the power or right to change the beneficiary and the coming into possession and enjoyment of the property by the beneficiary (but this did not occur until the death of the insured). In its final analysis, the measure of the tax is the value of the property transferred to the beneficiary for her possession and enjoyment. Possession and enjoyment of the property transferred to the beneficiary in a revocable trust, and possession and enjoyment of the property passing to the beneficiary in a life insurance policy containing the power of revocation as to the beneficiary, is the real subject of the tax.

> "The precise question presented is whether the *termination at death of that power* and the *consequent passing to the designated beneficiaries of all rights* under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax." *Chase National Bank v. United States*, 278 U. S. 327; 49 S. Ct. 126-127. (Italics ours.)

These two essential elements stated above must exist in the instant case if the case of *Chase National Bank*, supra, is to control here. If these two factors

do not legally exist, then this case does not control and is not applicable. In the instant case, the gift *inter vivos* was not testamentary and neither title, possession, nor enjoyment passed at death. The gift was made before September 8, 1916, and over nine years before the death of M. A. Gwinn. If we are going to compare the cases of *Saltonstall, Reinecke,* and *Chase National Bank,* supra, with the instant case to see if they control, when making comparisons, those things which are compared must be identical or similar in pertinent factors, to make possible even an approximation to the truth.

The rule in its present form, stated in the cases of *Reinecke* and *Chase National Bank,* supra, was founded upon the fact that the trustor or the insured had *exclusive* control of the gifts made *inter vivos,* but effective only at death. The gifts made *inter vivos* were not subject to a joint control. The donor could recall his gift, or change his beneficiary and do as he pleased with his property up to the time of his death. The donor had no adverse interest in the gift. The donor did not have to get the consent of his beneficiary to recall the gift. The nonexercise of the power to recall the gift freed the beneficiaries of the possibility that the gift would be recalled or the beneficiary changed.

It is, therefore, evident that the donor could recall the gift and change the beneficiary of the trusts or the life insurance policies, and this power was not terminated until death. The donor controlled the disposition of the gifts up until his death, and possession

and enjoyment of the property passed to the beneficiaries only at or after death. This last point is important, as we will show.

In the case of *Chase National Bank v. United States,* supra, it was pointed out:

> "The power of disposition is reserved *exclusively* to the transferor for his own benefit. Such an outstanding power residing *exclusively* in the donor to recall a gift after it was made is a limitation on the gift which makes it incomplete as to the donor as well as the donee." (Italics ours.)

This point is important: The power to recall and the right to change the beneficiary. Did the decedent, M. A. Gwinn, up to the time of her death, have the power to make a gift of her interest in the joint tenancy with the power to recall and the right to change her beneficiary? The answer is no.

These powers did not cease at death like in the cases involving gifts *inter vivos* upon which respondent relies. The distinction between the *Gwinn* case and the cases respondent relies upon, supra, is that in the *Gwinn* case the gift was complete as to the beneficiary; whereas, in the cases respondent cites, the gifts were incomplete, due to the fact that the donor had the power to recall the gift and the right to change his beneficiary.

A joint tenant is the opposite of a sole tenant. A sole tenant, as well as the donor of a revocable trust, has exclusive control of his property; this is also true of the insured in a life insurance policy. A joint

tenant is subject to a joint control of the joint property. The joint tenant does not control the disposition of the gift *inter vivos* up to the moment of his death so that he could change his beneficiary effective at or after death like the insured or the donor of a revocable trust.

The joint tenant cannot effect any change in his beneficiary to take effect at or after death. The joint tenant cannot recall the gift *inter vivos* like the donor or insured. In order to recall the gift and sever the joint tenancy he must secure the consent of his cotenant; if he cannot secure this consent, to regain the gift or its value the joint tenant must file a suit for partition. This may result in receiving different property than that contributed to the joint tenancy or it may result in the sale of the gift property to the detriment of the plaintiff. Unlike the donor of a revocable trust, the joint tenant cannot recall the same gift. A division must be made according to the respective rights of the joint tenants.

Section 752, *California Code of Civil Procedure,* gives to either party a right of partition:

> "When several cotenants own real property as joint tenants * * * an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and a sale of such property, or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners."

Section 752a, *Code of Civil Procedure,* deals with partition of personal property. (1923 Edition.)

If the decedent, M. A. Gwinn, made a gift of her interest in the joint tenancy, the gift would have to be absolute in order to sever the joint tenancy. She could not make a revocable gift of the jointly owned property like the donor or insured. The decedent, M. A. Gwinn, could not dispose of her joint tenancy interest by a will. (33 *C. J.* 915 and cases cited.)

The decedent, M. A. Gwinn could not retain control of her gift *inter vivos* and at the same time have possession and enjoyment pass to a different beneficiary at or after death. The surviving joint tenant would take precedence over the donee. The donor of a revocable trust or the insured can change his beneficiary to take effect at or after death.

Green v. Skinner, 185 Cal. 435-440:

"But here the plaintiff does not for any purpose stand in the shoes of the defendant's grantor. Her right was wholly independent of him. It was, to be sure, a right which he had the power to destroy by a severance of the joint tenancy upon which they held the property, but, *unless this power was exercised in his lifetime, the right became complete as an incident of their tenancy.* (5) It is an old rule, in other words, that the joint tenant who survives does not take the moiety of the other from him or as his successor, but by right under the devise or conveyance by which the joint tenancy was created in the first instance. (Freeman on Cotenancy and Partition, sec. 28.)" (Italics ours.)

The case of *Green v. Skinner,* supra, clearly shows that the power to destroy, by a severance of the joint tenancy upon which they held the property, must be exercised in his lifetime otherwise the right of the surviving joint tenant became complete as an incident of the joint tenancy. The transfer was not made incomplete by the failure to sever the joint tenancy. The transfer was made complete by the instrument which created the joint tenancy.

The power of revocation of the gift *inter vivos* in the joint tenancy does not terminate at death like the power of revocation possessed by a donor of a revocable trust or the insured, who could recall the gift and change their beneficiary; the power of disposition remained in them up to the moment of death and the disposition of the property was effective only at or after death.

The joint tenant did not have the power to recall the gift without the consent of his cotenant and the joint tenant did not have the power to effect a disposition of her joint interest to another beneficiary to take effect at or after death. The distinction between exclusive control and joint control is quite clear.

The powers the joint tenant possessed did not terminate at death, but terminated prior to her death; this may be best illustrated by the *Chase National Bank* case, supra. There the insured had control of the policies up to the moment of his death with the power to recall the gift or change the beneficiary. This power terminated at death, thereby freeing the

beneficiaries of the possibility of the recall of the gift or the change in beneficiaries. Only at death did possession and enjoyment pass to the beneficiary.

The joint tenant could not control her gift up till death, and at the same time make a change in the beneficiary effective at or after death, such as the trustor and insured could do. This illustration clearly shows the distinction between a sole tenant and joint tenant. A power of revocation in a sole tenant terminates at death thereby making the transfer incomplete. The power of revocation in a joint tenancy terminates prior to death and must be exercised during lifetime. The power of revocation as to his beneficiary is not effective at or after death. A power of revocation in the transferor terminable at his death is different from the power to sever a joint tenancy which must be exercised in his lifetime. The failure to revoke the power in the first instance makes the transfer incomplete at his death, whereas the failure to sever the joint tenancy in his lifetime does not make the transfer incomplete for the reason that in one case the transfer was never completed as to the beneficiary, whereas in the other case the transfer was complete when the joint tenancy was created. In the first instance the power of revocation terminated at death, and it took death to effect the transfer to the beneficiary. In the second instance the power of revocation terminated immediately prior to death and death did not effect any transfer to the beneficiary.

Therefore the rule "that a transfer made subject to a power of revocation in the transferor, terminable at death, is not complete until his death," is not applicable to a joint tenancy where the power to sever or terminate must be exercised during the lifetime.

Mr. Justice Stone in his dissenting opinion in *Heiner v. Donnan,* supra, in which this Court held unconstitutional the provision (Sec. 302 (c) of the Revenue Act of 1926) by which a gift made within two years of death should be conclusively presumed to have been made in contemplation of death, makes the following comments and brings out the distinction we are endeavoring to show here.

> * * * "In Tyler v. United States, 281 U. S. 497, we upheld taxation, * * * although the gift was not testamentary and neither title, possession, nor enjoyment passed at death. Similar taxation of gifts made inter vivos, but finally effective only at death, was sustained in Reinecke v. Northern Trust Co., 278 U. S. 339, and Chase National Bank v. United States, 278 U. S. 327; see Taft v. Bowers, 278 U. S. 470, 482."
> * * * * * * *

Mr. Justice Stone also makes the following pertinent comment:

> "* * * A very different case would be presented if the taxed gift were made before the enactment of the taxing statute and many years before the death, as in Frew v. Bowers, 12 F. (2d) 625, 630. See Nichols v. Coolidge, supra. * * *."

In the *Tyler, Reinecke* and *Chase National Bank* cases "possession and enjoyment" of the gift prop-

erty was transferred to the beneficiary at death after the enactment of the taxing statute, therefore, a very different case exists here for the reason "possession and enjoyment of the whole" of the joint tenancy passed to the beneficiary prior to the first taxing statute of September 8, 1916.

The principles of law expressed in the cases of *Reinecke* and *Chase National Bank,* supra, are applicable to transfers in trust and life insurance contracts, each containing the power to revoke and the power to change the beneficiary, where sole tenants are the donors with exclusive control.

E.

1. THE WORD "BEFORE" IN SUBDIVISION (H) OF SECTION 302, ACT OF 1924, PROPERLY CONSTRUED MEANS BEFORE JUNE 2, 1924, TO SEPTEMBER 8, 1916.

This Court in the case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra, made the following statement:

> "As Section 302 (h) of the Act of 1924 (26 U. S. C. A. Sec. 1094 note) specifically makes the quoted provision of subdivision (e) applicable to estate created or existing before the passage of the statute, the question presented is not one of its construction or applicability, but of the power of Congress to impose the tax."

This Court in the *Phillips* case, supra, although it did not expressly say so, construed by implication the word "before" in Section 302 (h) to mean before

June 2, 1924, to September 8, 1916, with reference to the provisions of subdivision (e) of Section 302, Act of 1924. (Act of 1924 enacted June 2, 1924, Act of 1916 enacted September 8, 1916.) This is the construction we contend should be placed on the word "before" in the instant case.

The respondent himself placed this construction on the word "before" in Treasury Decision 4248 (infra) in his first construction of Section 302 (h), Act of 1924, such construction being restricted to subdivision (e) of Section 302.

> "The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916." (T. D. 4248, infra.)

It had long been contended by attorneys up to the time of the decision of this Court in *Phillips v. Dime Trust & Safe Deposit Co.,* supra, that each estate tax law enacted since February 24, 1919, to February 26, 1926, (1918 Act to 1926 Act) in effect repealed all of the provisions of the previous acts and that the successive acts are given a retroactive application if applied to transactions entered into before the applicable act. The *Phillips* case, supra, brings out the point that any joint tenancy or tenancy by the entirety created subsequent to September 8, 1916, is subject to tax to the extent of the interest of decedent at death. One would assume from reading the cases of *Tyler v. United States,* supra, and *Phillips v. Dime Trust & Safe Deposit Co.,* supra, which cases are the landmarks on the subject con-

tained therein; that September 8, 1916, was the starting point for the establishment of a taxing system that embraced within it, and subjected to tax, the value of the interest of a decedent in any joint tenancy or tenancy by the entirety created subsequent to September 8, 1916.

The respondent as the result of his interpretation of the *Tyler* case, supra, ignoring the fact that "the decision rested on the sole and only possible ground," that is: tax avoidance, or evasion, proceeds to construe the word "before" in Section 302 (h) Act of 1924 (43 Stat. 303) as meaning "regardless of when created."

> "The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created." (T. D. 4294, infra.)

Congress at the time it enacted the Revenue Act of 1924 was familiar with the case of *Shwab v. Doyle,* decided May 1, 1922, 258 U. S. 529, which case hinged upon the construction of the words "at any time" contained in Section 202 (b) Estate Tax Act of 1916. (39 Stat. 777-780.)

If Congress intended that the word "before" should mean, prior to September 8, 1916, or "regardless of when created," Congress would have so stated in subdivision h, Section 302. There is nothing to justify the construction the respondent has placed upon the word "before" contained in Section 302 (h) of the 1924 Act (43 Stat. 303) as meaning to

include under subdivision (e) of Section 302, joint tenancies created prior to September 8, 1916.

The respondent has construed the word "before" in Section 302 (h) Act of 1924 twice, each time differently. (See T. D. 4248-4295 infra.) What this Court said in *Shwab v. Doyle,* supra, is applicable here.

Shwab v. Doyle, supra:

> "He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer. Indeed, its simplicity attracts any one. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of court or juries, in repugnance or revolt, taking liberties with the act to relieve from its exaction to satisfy the demands of revenue."

The holding of this Court in the case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra, with respect to group 3 (joint tenancy) supports our contention:

> "Group 3 * * * If after, the tax was rightly laid, for reasons already stated, which support the tax with respect to the items in group 2."

The reasons that supported the tax with respect to Group 2 were the *Tyler* case, supra, and the fact that taxpayers had knowledge when they created joint estates subsequent to September 8, 1916, that such estates were to be embraced in a taxing system

whose object was to prevent tax avoidance or evasion by the creation of such estates, "relieves the present tax of the objection that it is arbitrarily retroactive."

The only conclusion that can be drawn from the above citation and Group 2, is that, a tax is arbitrarily retroactive when the respondent construes the word "before," as including in the gross estate, the value of the interest of decedent in a joint tenancy created before September 8, 1916, and subjecting the value of this interest to a tax. The tax, therefore, is wrongly laid. The rights of the joint tenants were fixed and determined by law prior to September 8, 1916, and it was never intended that such joint tenancies were to be included in a taxing system whose sole object was to prevent tax avoidance or evasions by the creation of such estates after September 8, 1916. The tax assessed and the tax proposed to be assessed is therefore arbitrarily retroactive, and if arbitrarily retroactive it offends the Fifth Amendment.

It is not necessary for this Court to declare Section 302 (h) of the Revenue Act of 1924 (43 Stat. 303) unconstitutional, in so far as it requires the inclusion under subdivision (e), the value of the interest of decedent in a joint tenancy created before September 8, 1916, and subjecting same to the tax imposed by Section 301. The same construction can be placed on the word "before" by this Court, as was made by the respondent in Treasury Decision 4248 (infra). The sole reason for amending Treasury Decision 4248

by Treasury Decision 4294 (infra) was based on the decision of this Court in the *Tyler* case, supra. The subsequent reviews of this case in the opinions in *Coolidge v. Long,* supra, *Phillips v. Dime Trust & Safe Deposit Co.,* supra, and *Heiner v. Donnan,* supra, shows that the purpose of Congress in enacting Section 202 (c) of the Revenue Act of 1916 (39 Stat. L. 777) and the similar provision in the subsequent acts was to prevent an avoidance or evasion of estate taxes by the creation of such estates subsequent to September 8, 1916, and the decision rested on this sole and only possible ground. There is now, therefore, no authority for the amendment made by respondent in Treasury Decision 4294 (infra). The construction made by respondent of the word "before" in Treasury Decision 4248 (infra) was the construction that Congress intended should be placed on this word. If Congress meant before September 8, 1916, with respect to subdivision (e) of Section 302, Congress should have so stated in clear, strong and imperative words.

Shwab v. Doyle, supra:

> "There is certainly in it no declaration of retroactivity, 'clear, strong, and imperative,' which is the condition expressed in United States v. Heth, 2 Cranch, 399, 413 (2 L. Ed. 479); also United States v. Burr, 159 U. S. 78, 82, 83, 15 Sup. Ct. 1002, 40 L. Ed. 82.
>
> If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

The word "before" will have *a double meaning* if construed to mean "regardless of when created," when it has already been construed by implication to mean before June 2, 1924, to September 8, 1916. Congress meant "before" to mean before June 2, 1924, to September 8, 1916, with respect to subdivision (e) of Section 302. Congress never intended "before" should include interests vested prior to September 8, 1916.

Congress in enacting Section 302 (h) of the Act of 1924, as retroactive to September 8, 1916, did so with the sole purpose of settling such a point as was raised by counsel in the case of *Phillips v. Dime Trust & Safe Deposit Co.,* supra:

> "But it is urged that the tax imposed with respect to groups 2 and 3 is invalid. As the creation of the tenancies by the entirety antedated the taxing statute and the earlier corresponding section had been repealed, it is insisted that the statute is given a retroactive operation such as that condemned by this court in" * * *

The statements of this Court under Group 2, *Phillips* case, supra, with reference to the aforegoing contention, by implication construes "before" to mean before June 2, 1924, to September 8, 1916.

2. SECTION 302 OF THE REVENUE ACT OF 1924 IS UNCONSTITUTIONAL IN SO FAR AS IT REQUIRES UNDER SUBDIVISION (H) THAT THERE SHALL BE INCLUDED UNDER SUBDIVISION (E) FOR THE PURPOSE OF IMPOSING THE TAX UNDER SECTION 301, THE VALUE OF DECEDENT'S INTEREST IN PROPERTY HELD AS JOINT TENANTS, WHICH JOINT TENANCY WITH RIGHT OF SURVIVORSHIP WAS CREATED, TRANSFERRED AND VESTED IN SURVIVOR IN JUNE, 1915, PRIOR TO THE ENACTMENT OF THE REVENUE ACT OF 1916.

If construed retroactively, Section 302 (h) and (e) are unconstitutional because:

(1) It takes private property without due process of law. It takes private property for a public use without compensation. It is arbitrary and so capricious as to amount to confiscation and offends the Fifth Amendment.

(2) It imposes a direct tax in violation of Article 1, Section 9, clause 4 of the Constitution.

A decedent at his death did not have the power to transfer, transmit or terminate his interest in the joint estate, therefore, as no interest could be transferred, transmitted or terminated at death, no interest ceased by reason of death or existed at death. Hence it was not taxable.

A joint tenancy created prior to September 8, 1916, did not at death transmit any property rights from the dead to the living, therefore, a tax imposed after September 8, 1916, on the interest of a decedent in a joint estate created prior to September 8, 1916, would be imposed not on the transmission or receipt of property by death, but on the creation of the joint tenancy.

Is the statute constitutional as applied to a joint tenancy created and transferred in June, 1915, long before the passage of the Revenue Act of 1924? In our opinion the act, if so construed is void as denying due process of law and as violating the Fifth Amendment to the Constitution. Especially will a legislative act not be construed to be retrospective when vested rights are thereby affected. *Auffm'ordt v. Rasin,* 102 U. S. 620, is in point. There the rights of the parties were fixed before an amendatory act of Congress was passed, an assignee in bankruptcy having acquired a vested right in certain securities or their value. Mr. Justice Miller, in the opinion of the Court, said (p. 622):

> "If it be conceded that Congress could do this, the principle is too well established to need the citation of authorities, that no law will be construed to act retrospectively unless its language imperatively requires such a construction. * * * and we see no reason to believe that in making a new rule on that subject Congress intended to make it retrospective, for the purpos of destroying rights of property or rights of action which had become vested before the passage of the law."

On September 8, 1916, Congress made a new rule under Section 202 (c), changing a rule centuries old for taxation purposes only. Section 302 (e) of the 1924 Act is similar to 202 (c). Section 302 (h) of the same Act as construed by the respondent does the thing this Court condemned in the above opinion.

Lewellyn v. Frick, 258 U. S. 238, is also in point:

> "Acts of Congress are to construed if possible in such a way as to avoid grave doubts of this kind, Panama R. R. Co. v. Johnson, 264 U. S. 375, 390, 44 S. Ct. 391, 68 L. Ed. 748. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be construed as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways * * *."

The following citation is a continuation of the above; it is interesting in that it expresses an opinion on Section 302, Revenue Act of 1924, subdivision (h) the section here under consideration.

Lewellyn v. Frick, 268 U. S. 238:

> "* * * go far toward deciding the one now before us. They also indicate that the Revenue Act of 1924, c. 234, 302 (h), 43 Stat. 253, 305, making (g) (the equivalent of (f) above) apply to past transactions, does not help but if anything hinders the Collector's construction of the present law. Smietanka v. First Trust & Savings Bank, 257 U. S. 602, 42 S. Ct. 223, 66 L. Ed. 391."

The learned Circuit Court states that the case of *Nichols v. Coolidge,* 274 U. S. 531, is not in point.

Nichols v. Coolidge, supra:

> "Certainly Congress may lay an excise upon the transfer of property by death, reckoned upon

the value of the interest which passes thereby. But under the mere guise of reaching something within its powers. Congress may not lay a charge upon what is beyond them. Taxes are very real things, and statutes imposing them are estimated by practical results."

Is not the respondent in his construction of subdivision (h) Section 302, 1924 Act, attempting to lay a charge on something which is beyond him?

The respondent is certainly reaching for something beyond him, when he includes joint ownerships with right of survivorship created prior to September 8, 1916, in the same class as joint ownerships with the right of survivorship created subsequent to September 8, 1916. Those joint ownerships created subsequent to September 8, 1916, were specifically declared or deemed by Congress in order to prevent tax evasion to be the subject of a transfer tax at death, to be measured by the value of decedent's interest in property held in joint ownership with right of survivorship, even though there were no legal transfer of property at death.

And we submit that Section 302 (h) of the statute here under consideration in so far as it requires that there shall be included under subdivision (e), (a statute enacted to prevent tax evasion) the value of decedent's interest in a joint tenancy created before September 8, 1916 (and not created to evade taxes) is, therefore, arbitrary and so capricious, so as to offend the Fifth Amendment.

Wherein and what way will Sections 302 (h) and (e), Act of 1924, as construed retroactively by the respondent in the instant case, violate the Constitution in the several ways enumerated.

The estate tax law of 1924 provides for a tax in the nature of an excise tax, upon the right or privilege of transmitting property at death. Consequently before the tax can attach there must be a transfer at death, in some shape or form.

Joint tenancies and tenancies by the entirety created prior to September 8, 1916, were not a part of a taxing system levied on estates passing at death by will or inheritance. Joint ownerships based upon the right of survivorship created after September 8, 1916, were specifically included in the 1916 Act and all subsequent acts in order to prevent tax evasion.

Congress can declare or deem that a transfer takes place at death with respect to a joint tenancy or tenancy by the entirety created subsequent to September 8, 1916. It is only in that event or in those circumstances, that a tax can be due under said law. Now, where, as in the case at bar, the joint tenancy was created, transferred and vested in June, 1915, nine years before the passage of the 1924 Act and over nine years before the death of the transferor and where the property passed and takes effect both as to title and possession and enjoyment of the whole, no transfer of that property takes place at the death of the transferor and, therefore, no tax, under this law accrues.

Congress in effect declared on September 8, 1916, when it enacted Section 202 (c) to prevent tax evasion, that all those joint ownerships that were created prior to September 8, 1916, were not within the scope of the law.

> *Phillips v. Dime Trust & Safe Deposit Co.*, supra, Group 2:
>
> "Group 2. The tenancies in all of the items of the second group were created after the passage of the 1916 Revenue Act. Congress had by that act adopted a system of death taxes, embracing, as it lawfully might, estates by the entirety. As was pointed out in Tyler v. United States, supra, pages 503, 505 of 281 U. S., 50 S. Ct. 356, 359, such estates are appropriate subjects of death taxes and the taxation of them is a suitable measure to prevent evasion of a system of taxation levied on estates passing at death by will or inheritance."

Hence, if in spite of the fact that no transfer takes place at the death of the transferor and no transfer was declared or deemed to take place at death like in those joint estates created subsequent to September 8, 1916, the respondent levies and collects a death or transfer tax, he taxes something that never existed; that never took place. Now, if all this be true, if no transfer took place at death of decedent and none was declared or deemed to take place at death like in joint estates created subsequent to September 8, 1916, and the respondent, notwithstanding these facts, proceeds to levy upon and collect from the estate of decedent

a transfer tax measured by the value of property transferred by decedent during her life, and under which transfer the transferee became at once entitled to the title and possession and enjoyment of the whole of the property transferred, then manifestly, the amount of tax so collected and the present tax, is not a transfer or excise tax because, as to the particular property, there has been no transfer and no transfer was declared or deemed as explained above.

Then what kind of tax is it? There can be but one answer. If it cannot be a tax upon the right to transmit property at death because there was no transfer of this particular property at death, or if it is not in the class of estates specifically included by Congress to prevent tax evasion, in which a transfer was declared or deemed to take place at death, if created subsequent to September 8, 1916, then the tax must be a tax upon property. But the Estate Tax Act of 1924 does not provide for the imposition of a tax on property. If, therefore, while claiming to act under this law, the respondent levies and collects such tax without authority of law, that is taking private property without due process of law, and is taking private property for public use without compensation.

2. What has just been stated shows that subdivisions (h) and (e) of Section 302, if construed retroactively, would take property without due process of law and take private property for public uses without compensation. It also shows that the tax levied upon and collected from the estate of M. A. Gwinn and the

present tax, because of the gifts *inter vivos* between decedent and her only son, J. H. Gwinn, is a direct tax.

We have demonstrated that the tax collected and the proposed tax is not a transfer, death or excise tax, because there was no transfer of property at death nor did possession and enjoyment of the property pass to the beneficiary at death in contemplation of law, then this tax must be a tax upon property. If it is a tax on property, then it is a direct tax and must be apportioned as the Constitution directs.

The Act of 1924, subdivisions (h) and (e) of Section 302, is applicable only to joint ownerships with right of survivorship, created subsequent to September 8, 1916, and the tax will be imposed at death upon the value of the interest of decedent in such joint ownerships.

CONCLUSION.

For the reasons set forth above, it is submitted that the judgment of the United States Circuit Court of Appeals for the Ninth Circuit was erroneous and should be reversed.

Dated, San Francisco, California,
October 1, 1932.

Respectfully submitted,
THOMAS A. THACHER,
FRANK I. FORD,
LLEWELLYN A. LUCE,
Attorneys for Petitioner.

RALPH W. SMITH,
Of Counsel.

(Appendix Follows.)

Appendix

Statute and Regulations Involved

STATUTE

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the en-

tirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractioual part to be determined by dividing the value of the property by the number of joint tenants;

* * * * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

REGULATIONS

Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of

property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Regulations 68, issued under the Revenue Act of 1924 merely copied Section 302(h) of that Act, but did not construe it.

Treasury Decision 4248 (VII-2 Cumulative Bulletin 358-359), promulgated November 23, 1928, provides:

Treasury Department,
Office of Commissioner
of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. Blair,
Commissioner of Internal Revenue.

Approved November 23, 1928.
A. W. Mellon,
Secretary of the Treasury.

Treasury Decision (4294) (IX-2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

Treasury Department,
Office of Commissioner
of Internal Revenue,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last sentence of article 22 of Regulations 68, added thereto by Treasury Decision 4248, is amended to read as follows:

The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created.

Robt. H. Lucas,
Commissioner of Internal Revenue.

Approved July 3, 1930.
A. W. Mellon,
Secretary of the Treasury.

Section 220 of the New York State tax law (Consolidated Laws, ch. 60) was amended by chapter 554 of the laws of 1915 by the addition thereto of subdivision 7, which read as follows:

"Whenever intangible property is held in joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of surviving tenant by

California 1917 statutes, page 882, Section 2, paragraph 5.

"Whenever property, real or personal, is held in the joint names of two or more persons, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons, the right of the surviving joint tenant or joint

the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provision of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will." New York 1915 statutes, page 2238.

New York 1916 statutes, page 866, same as above with exception of first line which reads:

"Whenever property is held in joint names to two • • •"

tenants, person or persons to immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provision of this act in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or joint depositor and had been bequeathed to the surviving joint tenant or joint tenants, person or persons, by such deceased joint tenant or joint depositor by will, excepting therefrom such part thereof as may be proved by the surviving joint tenant or joint tenants to have originally belonged to him or them and never to have belonged to the decedent." Approved May 23, 1917. In effect July 27, 1917.

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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1931

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 841

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. Gwinn, petitioner

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–18) is reported in 20 B. T. A. 1052. The opinion of the Circuit Court of Appeals (R. 32) is reported in 54 F. (2d) 728.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1932. (R. 40.) A petition for rehearing was denied on February 23, 1932.

(R. 41.) The petition for a writ of certiorari was filed March 29, 1932. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in computing the Federal estate tax of a decedent who died October 5, 1924 (which tax was consequently governed by Section 302 of the Revenue Act of 1924), the Commissioner was justified in including in the gross estate one-half of the value of certain property held by the decedent and the petitioner as joint tenants under a joint tenancy created in June, 1915.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 13–16.

STATEMENT

The Board of Tax Appeals found the facts as stipulated by the parties. (R. 11–13.) They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn, and is in actual or constructive possession of the property of the decedent, who died October 5, 1924. (R. 11.)

In June, 1915, the decedent and the petitioner, while residing in California, acquired certain property as joint tenants, with the right of survivorship

and not as tenants in common, and the decedent and the petitioner contributed equal amounts of property to the estate in joint tenancy so created by them. (R. 12.)

In computing the value of the gross estate of the decedent, the respondent determined the value of all of the property held as joint tenants by the decedent and the petitioner and then included in the gross estate of the decedent half of the value of the property so held. (R. 11.) No effort was made to include anything other than the decedent's half of the total estate held in joint tenancy. (R. 11–12.)

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2,172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61.

Upon these facts the Board of Tax Appeals held that half of the value of the property held in joint tenancy by the decedent and the petitioner must be included in the decedent's gross estate for Federal estate tax purposes, and entered its order that there is a deficiency in Federal estate tax in the sum of $719.61. The Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the Board of Tax Appeals.

ARGUMENT

I

DURING THE LIFETIME OF THE DECEDENT IT WAS WITHIN HER POWER TO SEVER THE JOINT TENANCY AND THUS TO DESTROY THE RIGHT OF SURVIVORSHIP; THE TERMINATION OF THIS POWER ON THE DECEDENT'S DEATH IS A PROPER SUBJECT OF THE ESTATE TAX

Section 302 of the Revenue Act of 1924 (*infra*, pp. 13–14), which was in effect at the time of the decedent's death, provides that the value of the gross estate of a decedent shall include—

> the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: * * *.

By Section 302 (h) it is provided that this provision shall apply to all joint tenancies whether they are created "before or after the enactment of this Act." The sole question involved in this case is whether this clearly expressed intention of Congress violates the due process clause of the Fifth Amendment.

The property in question was held by the decedent and the petitioner as joint tenants, under a tenancy which was created in 1915. (R. 12.) Although survivorship is a necessary element of a joint estate, it is familiar law that a joint tenancy may be severed in any one of several ways. A severance terminates the joint estate and with the termination the right of survivorship ceases. This is established by the decisions of the California courts and by California statutes as well as at common law.

Thus, "a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share" (*Green* v. *Skinner,* 185 Cal. 435, 438); a joint tenant may bring an action for a partition of his interest (Sec. 752, Cal. Code of Civil Procedure); an involuntary alienation of the interest of one tenant severs the tenancy and destroys the right of survivorship (*Hilborn* v. *Soale,* 44 Cal. App. 115).

It is thus plain that under the law of California one joint tenant has the power at any time during his life to sever the joint tenancy and thus to destroy the right of survivorship. And it is likewise plain, under numerous decisions of this Court, that the cessation of this power, which was an event which occurred after enactment of the Revenue Act of 1924 was the proper occasion for the imposition of an estate tax.

In *Saltonstall* v. *Saltonstall,* 276 U. S. 260, this Court upheld the constitutionality of a Massachu-

setts statute taxing "the transfer of property passing to anyone on the exercise of a power of appointment *or the failure to exercise it.*" (276 U. S. 269.) This Court said (p. 271):

> And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

A similar result was reached by this Court in *Chase National Bank* v. *United States,* 278 U. S. 327, 338, where it was said:

> Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, * * *. And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin,* 240 U. S. 625; * * *.

This reasoning was adopted and applied in upholding the taxability of the two trusts involved in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

From these cases it is clear that the transfer of property which remains subject to the control of a person during his lifetime and passes to another at his death only because he has not exercised a

power which he might have exercised at any time during his life, may constitutionally be made subject to the estate tax in effect at the time of that person's death, regardless of when the estate was originally created. In the present case, it is true that the joint tenancy was created in 1915. But from the time of its creation until the time of the death of the decedent in 1924 the half of the property which it is now sought to tax was entirely in the decedent's control, and he might at any time have transferred it, or otherwise have severed the joint tenancy, thus terminating the right of survivorship without which the present petitioner would not have acquired the interest. The existence of this power in the decedent made the transfer to the petitioner incomplete until the decedent's death with respect to the half of the property now in question. That the termination at the decedent's death of the right to exercise this power is the proper subject of the estate tax is clearly established by the decisions of this Court.

II

THE DECEDENT'S DEATH BROUGHT ABOUT THE SHIFTING OF THE ECONOMIC BENEFITS OF PROPERTY, AND THIS EVENT HAVING TAKEN PLACE AFTER THE ENACTMENT OF THE TAXING STATUTE IS PROPERLY THE SUBJECT OF THE ESTATE TAX

The decedent's death in the present case occurred in 1924, after the enactment of the Revenue Act of 1924. Death was the "generating source" of

enlarged property rights in the petitioner and we submit that it was thus proper to include the property in the decedent's estate for this reason, as well as for the reason advanced in Point I of this brief, namely that until the death of the decedent it remained wholly within her power to determine whether the petitioner would or would not acquire the interests to which he has in fact succeeded.

In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. In that case the tenancy was created after the passage of the applicable taxing statute, so that the actual decision is not necessarily controlling here. But we submit that the grounds on which the decision in the *Tyler* case is based make it clear that the application of the taxing statute to a joint tenancy created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution.

In the present case the decedent's death was the event which made the shifting of the full benefits of ownership to the petitioner complete and effective, and secured to him the sole possession and enjoyment of the property unburdened by the decedent's rights. Until his death, the decedent retained a dominion over the property equal in all respects to that of the petitioner. Under the decision in the *Tyler* case, this ripening of property

rights is a proper subject for the imposition of a tax. See also *Klein* v. *United States*, 283 U. S. 231. There is nothing in the present case to bring it within the rules in *Nichols* v. *Coolidge*, 274 U. S. 531, in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, with respect to the "five trusts," or in *Coolidge* v. *Long*, 282 U. S. 582. The result of the death of the decedent in the instant case was not simply the coming into possession by the petitioner of an estate which he already owned irrevocably. Until the death of the decedent the petitioner had no interest whatever in the decedent's share of the property held in joint tenancy, except the possibility of survivorship, which it was within the decedent's power at any time to terminate. Thus, it is clear that death in the present case was not merely the occasion for the coming into possession of an already vested remainder, but was the "generating source" of new rights, and was consequently the proper subject of an estate tax regardless of the time when the tenancy was created.

In *Knox* v. *McElligott*, 258 U. S. 546, it appeared that the decedent and another became joint tenants of certain property in 1912. The decedent died in 1917, and his executors included in the return of the Federal estate tax on his estate the value of one-half of the jointly owned property. Thereafter the Commissioner of Internal Revenue added to the estate the one-half of the value which had not

been included in the original return. This Court held that only the one-half of the value of the property which had been included in the original estate-tax return could be made subject to the estate tax.

It is plain that there is nothing in *Knox* v. *McElligott* which is inconsistent with the respondent's position in the instant case. For in that case one-half of the jointly owned property was taxed, and there is no effort in the present case to tax more than one-half of the value of the property held jointly by the decedent and the petitioner. (R. 11–12.) Furthermore, *Knox* v. *McElligott* involved only a question of construction, which is not present in the instant case, for Section 302 (h) of the Revenue Act of 1924 (*infra,* p. 14) expressly provided that Section 302 (e) relating to joint tenancies, shall apply to tenancies whether made or created "before or after the enactment of this Act."

For similar reasons the decision below is not in conflict with *Carter* v. *English,* 15 F. (2d) 6 (C. C. A. 9th), and *Lynch* v. *Congdon,* 1 F. (2d) 133 (C. C. A. 8th). In each of those cases the statute involved was the Revenue Act of 1916, which contained no express provision making it apply to joint tenancies created before its passage. *Doe* v. *Commissioner,* 18 B. T. A. 427, and *Mastick* v. *Commissioner,* 18 B. T. A. 428, arose under the Revenue Act of 1918, which contained no provision corre-

sponding to Section 302 (h) of the Revenue Act of 1924. The petitioner relies on *Estate of Gurnsey,* 177 Cal. 211, as establishing the law of California that the survivor takes nothing upon the death of his co-tenant. But this same argument, based upon the theoretical conceptions of State law, was advanced by the taxpayer in *Tyler* v. *United States.* 281 U. S. 497, *supra,* and was rejected by this Court. In its opinion this Court said (p. 503):

> This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law.

The question here involved has been considered by several State courts, which have held that on the death of a joint tenant a State inheritance tax statute might constitutionally be applied to tax half the value of property held in joint tenancy, even though the estate was created before the passage of the taxing Act. *Matter of McKelway,* 221 N. Y. 15; *Tax Commission* v. *Hutchison,* 120 Ohio St. 361; *Will of Ray,* 188 Wis. 180.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

APRIL, 1932.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

STATUTE

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is propor-

tionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

REGULATIONS

Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, provided in part:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contrib-

uted towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Treasury Decision 4248 (VII–2 Cumulative Bulletin 358–359), promulgated November 23, 1928, provides:

> TREASURY DEPARTMENT,
> OFFICE OF COMMISSIONER,
> OF INTERNAL REVENUE,
> *Washington, D. C.*
>
> *To Collectors of Internal Revenue and Others Concerned:*
>
> Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:
>
> The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.
>
> D. H. BLAIR,
> *Commissioner of Internal Revenue.*
>
> Approved November 23, 1928.
>
> A. W. MELLON,
> *Secretary of the Treasury.*

Treasury Decision 4294 (IX–2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last sentence of article 22 of Regulations 68, added thereto by Treasury Decision 4248, is amended to read as follows:

The statute extends to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930.

A. W. MELLON,
Secretary of the Treasury.

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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1932

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, DECEASED, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 31

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. Gwinn, deceased, petitioner

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–18) is reported in 20 B. T. A. 1052. The opinion of the Circuit Court of Appeals (R. 32–39) is reported in 54 F. (2d) 728.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1932. (R. 40.) A petition for rehearing was denied on February 23, 1932. (R. 41.) A petition for a writ of certiorari was filed March 29, 1932, and was granted May 16, 1932. (R. 45.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in computing the Federal estate tax of a decedent who died October 5, 1924 (which tax was consequently governed by Section 302 of the Revenue Act of 1924), one-half of the value of certain property held by the decedent and the petitioner as joint tenants under a joint tenancy created in June, 1915, may constitutionally be included in the gross estate.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 29–40.

STATEMENT

The Board of Tax Appeals found the facts as stipulated by the parties. (R. 11–13.) They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn and is in actual or constructive possession of the property of the decedent, who died October 5, 1924. (R. 11.)

In June, 1915, the decedent and the petitioner, while residing in California, acquired certain property as joint tenants, with the right of survivorship and not as tenants in common, and the decedent and the petitioner contributed equal amounts of property to the estate in joint tenancy so created by them. (R. 12.)

In computing the value of the gross estate of the decedent, the respondent determined the value

of all of the property held as joint tenants by the decedent and the petitioner and then included in the gross estate of the decedent half of the value of the property so held. (R. 11.) No effort was made to include anything other than the decedent's half of the total estate held in joint tenancy. (R. 11–12.)

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2,172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61.

Upon these facts the Board of Tax Appeals held that half of the value of the property held in joint tenancy by the decedent and the petitioner must be included in the decedent's gross estate for Federal estate tax purposes, and entered its order that there is a deficiency in Federal estate tax in the sum of $719.61. The Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

Section 302 (e) of the Revenue Act of 1924 provides that there shall be included in the gross estate of a decedent the value "of the interest therein held as joint tenants by the decedent and any other

person." Section 302 (h) makes this provision applicable to all joint tenancies, whether they are created "before or after the enactment of this Act." The sole question involved in this case is whether this clearly expressed intention of Congress violates the "due process" clause of the Fifth Amendment.

II

The petitioner devotes a large part of his brief to the contention that under the law of California no change occurs in the title of a joint tenant on the death of his cotenant. This argument is based on the fictions of the local law announced in *Estate of Gurnsey,* 177 Cal. 211.

In *Tyler* v. *United States,* 281 U. S. 497, this Court considered exactly the same contention, made with respect to a tenancy by the entirety, and expressly rejected it.

III

The property in question was held by the decedent and the petitioner as joint tenants under a tenancy which was created in 1915. Although survivorship is a necessary element of a joint estate, it is familiar law that a joint tenancy may be severed in any one of several ways. A severance terminates a joint estate, and with the termination the right of survivorship ceases. California decisions and statutes show that a joint tenancy in that State may be severed (1) by a conveyance of all or part of the interest of a joint tenant, or (2) through proceedings brought for the partition of the inter-

est of a tenant, or (3) by the involuntary alienation of the interest of one tenant through bankruptcy proceedings or on execution.

Thus it is plain that under the law of California one joint tenant has the power at any time during his life to sever the joint tenancy and thus to destroy the right of survivorship. And it is likewise plain, under numerous decisions of this Court, that the cessation of this power, which was an event which occurred after the enactment of the Revenue Act of 1924, was a proper occasion for the imposition of an estate tax. *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

From the time of the creation of the joint tenancy until the time of the death of the decedent in 1924, the half of the property which it is now sought to tax was entirely in the decedent's control, and he might at any time have transferred it or otherwise have severed the joint tenancy, thus terminating the right of survivorship, without which the present petitioner would not have acquired the interest. The existence of this power in the decedent made the transfer to the petitioner incomplete until the decedent's death with respect to the half of the property now in question. That the termination at the decendent's death of the right to exercise this power is an appropriate subject of the estate tax is clearly established by the decisions of this Court just cited.

IV

The decedent's death brought about the shifting of the economic benefits of property, and this event, having taken place after the enactment of the taxing statute, is properly the subject of the estate tax. In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. The grounds on which the decision in this case is based make it clear that the application of the taxing statute to a joint tenancy created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution. In its opinion in the *Tyler case,* the Court stated that the death of a tenant by the entirety was the "generating" source resulting in the "bringing into being or the enlargement of property rights," and that if Congress chose to place a tax upon such a result there was nothing in the Constitution which prevented it. See also *Klein* v. *United States,* 283 U. S. 231. The ripening and completion of the economic benefits to the survivor does not occur until the death of the decedent. Upon the happening of that event the tax is imposed and no question of retroactivity is involved.

The decision in *Knox* v. *McElligott,* 258 U. S. 546, is not inconsistent with the respondent's position in the instant case, for in that case one-half of the jointly owned property was taxed, and there is no effort in the present case to tax more than one-half of the value of the property held jointly by the

decedent and the petitioner. Furthermore, *Knox* v. *McElligott* involved only a question of construction, which is not present in the instant case, for Section 302 (h) of the Revenue Act of 1924 (*infra*, p. 32) expressly provides that Section 302 (e), relating to joint tenancies, shall apply to tenancies whether made or created "before or after the enactment of this Act."

ARGUMENT

I

THE STATUTE REQUIRES THE INCLUSION IN THE DECEDENT'S GROSS ESTATE OF THE VALUE OF HIS INTEREST IN THE JOINT TENANCY

Section 302 of the Revenue Act of 1924 (*infra*, pp. 31–32), which was in effect at the time of the decedent's death, provides that the value of the gross estate of a decedent shall include—

> the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: * * *

By Section 302 (h) this provision is specifically made applicable to all joint tenancies whether they

are created "before or after the enactment of this Act."

The petitioner contends (Br. 55–61) that the word "before" used in Section 302 (h) should be interpreted or construed to mean only that period before June 2, 1924, which is after September 8, 1916. But the words "before or after" are all-inclusive and admit of no limitation or qualification.[1] This Court has already decided the question; in *Nichols* v. *Coolidge,* 274 U. S. 531, the words "whether such transfer or trust is made or created before or after the passage of this Act," used in Section 402 (c) of the Revenue Act of 1918, were held to make the statute applicable to a transfer made in 1907. The petitioner states (Br. 61) that *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160, supports his contention "by implication." The *Phillips case* involved no such question and made no such construction by implication or otherwise.

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[1] The petitioner refers to Treasury Decision 4248 (*infra*, p. 37), which was in effect from November 23, 1928, to July 3, 1930. This regulation made the statute applicable only to joint ownerships "created subsequent to September 8, 1916." But this qualification of the language of the statute was not based upon a construction of its provisions; it was the Commissioner's expression of his view at that time that the statute could not constitutionally be applied to joint tenancies created before that date. After this Court's decision in *Tyler* v. *United States*, 281 U. S. 497, the regulation was amended so as to include all joint tenancies.

The sole question involved in this case, therefore, is whether this clearly expressed intention of Congress violates the "due process" clause of the Fifth Amendment.

II

THIS COURT HAS ALREADY REJECTED THE PETITIONER'S CONTENTIONS BASED ON THE FICTIONS OF THE LOCAL LAW

The petitioner devotes a large part of his brief to the contention that the property in question can not be taxed because (Br. 9) under the law of California "the title to the joint property does not pass to and vest in the survivor, upon the death of his cotenant, but * * * each is seized of the whole estate from the first, and no change occurs in his title on the death of his cotenant." This argument is based on the fictions of the local law announced in *Estate of Gurnsey,* 177 Cal. 211, and similar cases.

The basis for this argument, in the language of the court below (R. 34), "has been completely overturned" by decisions of this Court. In *Tyler* v. *United States,* 281 U. S. 497, this Court considered exactly the same contention, made with respect to a tenancy by the entirety, and expressly rejected it. In its opinion this Court said (pp. 501, 503):

> The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a

> unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. These decisions establish a state rule of property, by which, of course, this court is bound. *Warburton* v. *White,* 176 U. S. 484, 496.
>
> * * * * *
>
> According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. * * *

The decision in the *Tyler case* thus makes it plain that there is no merit in the petitioner's oft-repeated contention that this Court is bound by the fictions of local law announced in *Estate of Gurnsey,* 177 Cal. 211, *supra.*

III

DURING THE LIFETIME OF THE DECEDENT IT WAS WITHIN HIS POWER TO SEVER THE JOINT TENANCY AND THUS TO DESTROY THE RIGHT OF SURVIVORSHIP; THE TERMINATION OF THIS POWER ON THE DECEDENT'S DEATH IS THE PROPER SUBJECT OF THE ESTATE TAX

The property in question was held by the decedent and the petitioner as joint tenants, under a tenancy which was created in 1915. (R. 12.) Section 683 of the California Civil Code, as it was in effect in 1915 and until after the death of the decedent, provided that—

> A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or one granted or devised to executors or trustees as joint tenants.

One of the incidents of a joint tenancy is the right of survivorship. *Greer* v. *Blanchar,* 40 Cal. 194.

Although survivorship is a necessary element of a joint estate, it is familiar law that a joint tenancy may be severed in any one of several ways. A severance terminates the joint estate, and with the termination the right of survivorship ceases. This is established by the decisions of the California courts and by California statutes, as well as at common law.

At least three methods of effecting the severance of a joint tenancy are clearly illustrated by California decisions or statutes: (1) In *Green* v. *Skin-*

ner, 185 Cal. 435, 438, the Supreme Court of California declared:

> It is the law that a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share.

(2) Section 752 of the California Code of Civil Procedure provides that any joint tenant may bring an action for the partition of his interests. Partition, of course, destroys the right of survivorship. And (3), in *Hilborn* v. *Soale,* 44 Cal. App. 115, it was held that an involuntary alienation of the interest of one tenant severed the tenancy and destroyed the right of survivorship. The court said (p. 117):

> The execution sale of the interest of Wilson A. Soale to the plaintiff here severed the joint tenancy, and left plaintiff and defendant Carl B. Soale tenants in common, * * *.

It is thus plain that under the law of California one joint tenant has the power at any time during his life to sever the joint tenancy and thus to destroy the right of survivorship.[2] And it is like-

[2] In *Estate of Gurnsey,* 177 Cal. 211, 215, the Supreme Court of California declared: "The joint tenancy referred to in the Civil Code (sec. 683), and here involved, is the estate known as such at common law."

Common-law authorities establish that there are at least five ways in which a joint tenancy may be ~~severed~~ severed: (1) By a conveyance by one of the joint tenants of all or a part of his interest; (2) by mutual agreement between the cotenants; (3) by a course of dealing which intimates "that the

wise plain under numerous decisions of this Court that the cessation of this power, which was an event which occurred after the enactment of the Revenue Act of 1924, was a proper occasion for the imposition of an estate tax.

No effort has been made in the present case to tax any portion of the property except the one-half interest held by the decedent in the joint tenancy. Until the decedent's death this interest was at all times subject to the decedent's power to sever the joint tenancy. This power was held by the decedent entirely independently of any action on the part of the petitioner or anyone else.[3] It was within the decedent's power voluntarily and at any time to sever the joint tenancy by conveyance of either all or a part of his interest to a third person or by instituting partition proceedings. It was not until the decedent died without exercising this power that the petitioner had any certainty of acquiring the other half of the joint property, and it is only this half of the property upon which the tax is laid. The parallel between the situation thus

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interests of all were mutually treated as constituting a tenancy in common" (*Williams* v. *Hensman*, 1 Johns. & H. 546, 557); (4) by partition proceedings brought by one or more of the joint tenants; and (5) by involuntary alienation of the interest of one of the joint tenants, through bankruptcy or on execution. See 2 Blackstone, Commentaries 185–186; Freeman, Cotenancy & Partition (2d ed.), Secs. 29–33; 1 Tiffany, Real Property (2d ed.), 637–640.

[3] The petitioner's statement (Br. 50) that in order to "sever the joint tenancy he must secure the consent of his cotenant" is without support either in law or fact.

involved in this case and that presented where a power of appointment or a power of revocation ceases on death is almost exact. In both of the latter situations this Court has held that an estate tax may validly be levied, although the original transfer of the property subject to the power of appointment or the power of revocation was made many years before the enactment of any estate tax law.

In *Saltonstall* v. *Saltonstall,* 276 U. S. 260, it appeared that on various dates between 1905 and 1907, before the passage of any estate or succession tax law, property was transferred on trust with the provision that on the death of the settlor it should be paid to the plaintiffs. The trust instrument provided that its terms might be changed and the trust terminated in whole or in part by the settlor with the concurrence of the one trustee. After the creation of the trusts but before the death of the settlor, the legislature of Massachusetts enacted a statute taxing "the transfer of property passing to anyone on the exercise of a power of appointment *or the failure to exercise it* * * *." (276 U. S. 269.) The constitutionality of this statute was attacked on the ground that it deprived the plaintiffs of property without due process of law because it taxed them on an interest they had already received before the enactment of the taxing Acts. It was contended that the plaintiffs had vested interests or remainders subject only to being divested by the exercise of the reserved power, which never happened, and that as their remainders vested before

the enactment of the taxing statute they could not constitutionally be made subject to the tax. This Court held that the tax could constitutionally be imposed, saying (p. 271):

> And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

A similar question was considered by this Court in *Chase National Bank* v. *United States,* 278 U. S. 327. It was there held that the proceeds of insurance policies on the decedent's life, paid for by the decedent and taken out prior to the passage of the applicable Act but after 1916, might constitutionally be included in the gross estate in determining the Federal estate tax when the insured reserved the right to change the beneficiary. This Court observed that (p. 334)—

> until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them.

The cessation at death of this power was held to be a proper ground for including the value of the property in the measure of the estate tax. This Court said (p. 338):

> Termination of the power of control at the time of death inures to the benefit of

> him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, * * *. And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin,* 240 U. S. 625; * * *.

On the same day on which the decision in *Chase National Bank* v. *United States, supra,* was announced, this Court decided *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. In that case it appeared that the decedent had created two trusts, among others, one in 1903 and one in 1910. In these two trusts the income was reserved to the settlor for life, and on his death the income was to be paid to a designated person with remainders over. By the terms of each of the two trusts there was reserved to the settlor alone a power of revocation of the trust. The decedent died in 1922. It was held that on his death the value of the property comprising these two trusts might constitutionally be included in the measure of the estate tax, although the trusts had originally been created long before the passage of any Federal estate tax law. This Court said (p. 345):

> As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive,

within the ruling of *Nichols* v. *Coolidge,* 274 U. S. 531. In that case it was held that the provisions of the similar Sec. 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States,* decided this day, *ante,* p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence Sec. 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States, supra,* we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

From these cases it is clear that property which remains subject to the control of a person during his lifetime, and passes to another at his death only because he has not exercised a power which he might freely have exercised at any time during his life, may constitutionally be made subject to the estate tax in effect at the time of that person's death, regardless of when the estate was originally

created. In the present case it is true that the joint tenancy was created in 1915. But from the time of its creation until the time of the death of the decedent in 1924 the half of the property which it is now sought to tax was entirely in the decedent's control, and he might at any time have transferred it, or otherwise have severed the joint tenancy, thus terminating the right of survivorship, without which the present petitioner would not have acquired the interest. The existence of this power in the decedent made the transfer to the petitioner incomplete until the decedent's death with respect to the half of the property now in question. That the termination at the decedent's death of the right to exercise this power is the proper subject of the estate tax is clearly established by the decisions of this Court in *Saltonstall* v. *Saltonstall, Chase National Bank* v. *United States,* and *Reinecke* v. *Northern Trust Co., supra.*

IV

THE DECEDENT'S DEATH BROUGHT ABOUT THE SHIFTING OF THE ECONOMIC BENEFITS OF PROPERTY, AND THIS EVENT, HAVING TAKEN PLACE AFTER THE ENACTMENT OF THE TAXING STATUTE, IS PROPERLY THE SUBJECT OF THE ESTATE TAX

The decedent's death in the present case occurred in 1924, after the enactment of the Revenue Act of 1924. This event was the "generating source" of enlarged property rights in the petitioner; and we submit that it was thus the proper subject of an estate tax for this reason, as well as for the reason

advanced in Point III of this brief, namely, that until the death of the decedent it remained wholly within his power to determine whether the petitioner would or would not acquire the interests to which he has in fact succeeded.

In *Nichols* v. *Coolidge,* 274 U. S. 531, this Court enunciated the rule that Congress may not constitutionally exact an estate tax on property which was finally transferred before the enactment of the taxing statute. Similar principles were later applied in *Untermyer* v. *Anderson,* 276 U. S. 440, and in *Coolidge* v. *Long,* 282 U. S. 582, in both of which it was held that taxing statutes violated a "due process" clause of the Constitution.

But in the present case the event which is taxed is the "shifting of the economic benefits of property," which takes place on the decedent's death, after the enactment of the taxing statute. In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. In that case the tenancy was created after the passage of the applicable taxing statute, so that the actual decision is not necessarily controlling here. But we submit that the grounds on which the decision in the *Tyler case* is based make it clear that the application of the taxing statute to a joint tenancy created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution.

In its opinion in the *Tyler case* this Court stated that the death of a tenant by the entirety was the "generating source" resulting in "the bringing into being or the enlargement of property rights" and that if Congress chose to place a tax upon such a result there was nothing in the Constitution which prevented. The Court then said (pp. 503–504):

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.
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> * * * * *
>
> Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler case,* No. 428) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property

> except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other.

These extracts from the opinion in the *Tyler case* make it clear that death, the event which is the occasion for the imposition of the tax, is the generating source of the enlargement of property rights in the survivor. This is an event which takes place after the passage of the taxing statute regardless of when the tenancy was created. In the present case the decedent's death was the event which made the shifting of the full benefits of ownership to the petitioner complete and effective and secured to him the sole possession and enjoyment of the property unburdened by the decedent's rights. Until his death the decedent retained a dominion over the property equal in all respects to that of the petitioner. Under the decision in the *Tyler case* this ripening of property rights is a

proper subject for the imposition of a tax. See also *Phillips* v. *Dime Trust Co.*, 284 U. S. 160.[4]

A similar question was considered in *Klein* v. *United States*, 283 U. S. 231. There it appeared that prior to the passage of the applicable revenue law, but after 1916, a husband had conveyed a life estate to his wife with the provision that she should take the remainder in case he should die before she should. It was held that on the death of the husband the value of the remainder might constitutionally be included in the measure of the gross estate. In reaching this result this Court said (p. 234):

> It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare *Tyler* v. *United States*, 281 U. S. 497.

See also *Saltonstall* v. *Saltonstall*, 276 U. S. 260, *Chase National Bank* v. *United States*, 278 U. S. 327, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, which are discussed in Point III of this brief.

The principles announced by this Court in the decisions just referred to have been applied not

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[4] The petitioner seems to think his position finds support in *Phillips* v. *Dime Trust Co.*, *supra*. See his brief, pp. 34, 55, 67. But a reading of that decision makes it plain that the present question was expressly left undecided. The reasoning of the case lends direct support to our views.

only by the court below in the present case but also by several other of the lower Federal courts in cases presenting similar questions. Thus in *Grandin* v. *Heiner,* 56 F. (2d) 1082, the Circuit Court of Appeals for the Third Circuit held that the proceeds of insurance policies were subject to the Federal estate tax when the decedent retained the power to change the beneficiary, although the policies were taken out many years prior to the enactment of the Revenue Act of 1916. This Court denied a petition for a writ of certiorari, 286 U. S. 561. In *Lee* v. *Commissioner,* 57 F. (2d) 399, the Court of Appeals of the District of Columbia held that property passing under a general power of appointment was subject to the Federal estate tax although the power was created in 1891. This Court denied certiorari, 286 U. S. 563. The same result was reached by the Circuit Court of Appeals for the First Circuit in *Stratton* v. *United States,* 50 F. (2d) 48, certiorari denied, 284 U. S. 651, where the powers in question were all created prior to September 8, 1916. And in *Third National Bank & Trust Co.* v. *White,* 45 F. (2d) 911, affirmed without opinion, 58 F. (2d) 1085 (C. C. A. 1st), certiorari granted October 17, 1932 (No. 202, October Term, 1932), it was held that property held by a decedent as a tenant by the entirety may be made subject to the estate tax although the tenancy was created before September 8, 1916. The Board of Tax Appeals has uniformly reached the same result since the deci-

sion of this Court in the *Tyler case.*[5] See also *Emery* v. *Commissioner,* 21 B. T. A. 1038; *Griswold* v. *Commissioner,* 23 B. T. A. 635.

It would seem to follow from these decisions that the date of the creation of the tenancy is immaterial. The ripening and completion of the economic benefits to the survivor does not occur until the death of the decedent. Upon the happening of that event the tax is imposed and no question of retroactivity is involved.

In *Nichols* v. *Coolidge,* 274 U. S. 531, ~~in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, with respect to the "five trusts,"~~ and in *Coolidge* v. *Long,* 282 U. S. 582, this Court held that when a trust was created before the enactment of any taxing statute and no power of revocation was reserved, the mere coming into possession of a vested remainder could not constitutionally be made the subject of an estate or succession tax. But it is plain from the language used by the Court in its opinion in *Coolidge* v. *Long* that these decisions are applicable only to the situation where death brings about no more than the coming into possession of an estate which had

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[5] *Slocum* v. *Commissioner,* 21 B. T. A. 169; *Commerce Union Trust Co.* v. *Commissioner,* 21 B. T. A. 174; *Putnam* v. *Commissioner,* 21 B. T. A. 205; *Garrison* v. *Commissioner,* 21 B. T. A. 904; *Mercantile-Commerce National Bank* v. *Commissioner,* 21 B. T. A. 1347; *Robinson* v. *Commissioner,* 21 B. T. A. 1373; *Morton* v. *Commissioner,* 23 B. T. A. 236; *Bowditch* v. *Commissioner,* 23 B. T. A. 1266; *Levy* v. *Commissioner,* 25 B. T. A. 1174; *Dennis* v. *Commissioner,* B. T. A., decided October 6, 1932.

already irrevocably vested in the remainderman. Thus, in *Coolidge* v. *Long,* the Court said (pp. 597, 599):

> Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right of the remaindermen. * * *
>
> No Act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment.

But in the present case the result of the death of the decedent was not simply the coming into possession by the petitioner of an estate which he already owned irrevocably. Until the death of the decedent the petitioner had no interest in substance in the decedent's share of the joint tenancy, except the possibility of survivorship, which it was within the decedent's power at any time to terminate. Thus, it is clear that death in the present case was not merely the occasion for the coming into possession of an already vested remainder, but was the "generating source" of new rights, and was consequently the proper subject of an estate tax regardless of the time when the tenancy was created.

In *Knox* v. *McElligott,* 258 U. S. 546, it appeared that the decedent and another became joint tenants of certain property in 1912. The decedent died in 1917, and his executors included in the return of the Federal estate tax on his estate the value of one-half of the jointly owned property. Thereafter the Commissioner of Internal Revenue added to

the estate the one-half of the value which had not been included in the original return. This Court held that the one-half of the value of the property which had not been included in the original estate tax return was not subject to the estate tax.

It is plain that there is nothing in *Knox* v. *McElligott* which is inconsistent with the respondent's position in the instant case. For in that case one-half of the jointly owned property was taxed, and there is no effort in the present case to tax more than one-half of the value of the property held jointly by the decedent and the petitioner. (R. 11–12.) Furthermore, *Knox* v. *McElligott* involved only a question of construction, which is not present in the instant case, for Section 302 (h) of the Revenue Act of 1924 (*infra,* p. 32) expressly provides that Section 302 (e), relating to joint tenancies, shall apply to tenancies whether made or created "before or after the enactment of this Act." There was no such provision in Section 202 of the Revenue Act of 1916 (*infra,* p. 29) which was before the Court in *Knox* v. *McElligott.*[6] For similar reasons the decisions in *Carter* v. *English,* 15 F. (2d) 6 (C. C. A. 9th), and *Lynch* v. *Congdon,* 1 F.

[6] A case which is in all respects similar to *Knox* v. *McElligott* is *Walker* v. *Grogan*, 283 Fed. 530 (E. D. Mich.), affirmed, *Grogan* v. *Walker*, 300 Fed. 1004 (C. C. A. 6th), certiorari denied, 266 U. S. 603. Similarly, *Doe* v. *Commissioner*, 18 B. T. A. 427, and *Mastick* v. *Commissioner*, 18 B. T. A. 428, arose under the Revenue Act of 1918, which contained no provision corresponding to Section 302 (h) of the Revenue Act of 1924.

(2d) 133 (C. C. A. 8th), are not in point. They arose under the Revenue Act of 1916, which contained no provision making the tax applicable to joint tenancies created before September 8, 1916. Furthermore, *Carter* v. *English, supra,* was based on certain theoretical conceptions of State law concerning the nature of joint tenancy, derived from *Estate of Gurnsey,* 177 Cal. 211. As we have pointed out in Point II of this brief above, such an argument has already been rejected by this Court.

The regulations of the Treasury Department have not been uniform as to the question now under consideration. At first the Department applied the statute to all tenancies whenever created. Regulations 68, issued under the Revenue Act of 1924, merely copied Section 302 (h) of that Act (*infra,* pp. 33–36). In 1928 Treasury Decision 4248 (*infra,* p. 37) was promulgated, providing that the taxing statute did not apply to joint tenancies created before September 8, 1916, and a similar provision was included in Article 22 of Regulations 70 (1929 ed.), which was promulgated March 23, 1929, under the Revenue Act of 1926, as amended by the Revenue Act of 1928 (*infra,* pp. 36–37). But, on July 3, 1930, after the decision of this Court in the *Tyler case,* Treasury Decisions 4294 and 4295 (*infra,* pp. 37–38) were promulgated. These Decisions revoked the earlier ruling and expressly provided that all joint tenancies were subject to the

tax regardless of the time when they were created. These regulations are still in effect.

The question here involved has been considered by several State courts, which have held that on the death of a joint tenant a State inheritance tax statute might constitutionally be applied to tax half the value of property held in joint tenancy, even though the estate was created before the passage of the taxing Act. *Matter of McKelway,* 221 N. Y. 15; *Tax Commission* v. *Hutchison,* 120 Ohio St. 361; *Will of Ray,* 188 Wis. 180.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
Special Assistant to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

OCTOBER, 1932.

APPENDIX

STATUTES

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777–778) in Title II (Estate Tax) provided in part:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.
>
> * * * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 324), increased the rates of the estate tax, but made no other changes in this tax.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1097) in Title IV (Estate Tax) contained the same provision except that it was renumbered to be Section 402 (d).

The Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 278) in Title IV (Estate Tax) provided in part:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof:
>
> * * * * *

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent

of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

In the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 70–71; U. S. C. App., Title 26, Sec. 1094) in Title III (Estate Tax), Section 302 (e) is the same as Section 302 (e) in the Revenue Act of 1924, set out above, except that in the two places in which it appears the phrase "a fair consideration" is replaced by the phrase "an adequate and full consideration"; and Section 302 (h) is the same in the two Acts, except that in the Revenue Act of 1926 the words "Except as otherwise specifically provided therein" are inserted at the beginning of the subsection.

No changes were made in this provision by the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791) or by the Revenue Act of 1932 (Act of June 6, 1932, Public No. 154).

Congressional Committee Report

REVENUE ACT OF 1924

In the Report of the Committee on Finance, Senate Report No. 398, 68th Congress, 1st Session, it was said (p. 35):

SEC. 302 (e): The provisions of the House bill and the existing law have been reworded to secure greater clarity.

SEC. 302 (h): This subdivision provides that the property interests which are included in the gross estate for purposes of the estate tax are those enumerated in this section, whether such interests were created or arose or were relinquished before or after the enactment of this act.

A similar provision is included in subdivision (c) [relating to trusts] of section 402 of the existing act [Revenue Act of 1921]. It has seemed desirable to extend this provision expressly to the other property interests set forth in this section.

In the Conference Report, House Report No. 844, 68th Congress, 1st Session, it was said (p. 25):

> The provision of the House bill with reference to that part of the gross estate made up of property held by the decedent as a joint tenant or as a tenant by the entirety has been reworded for purposes of clarity. * * *

REGULATIONS UNDER THE REVENUE ACT OF 1924 AND SUBSEQUENT ACTS

Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, provided in part:

> ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a

banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2)

Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) Where the decedent furnished the entire purchase price, the entire property

should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire value of the property should be included; (d) where the other joint owner, prior to the acquirement of the property, received from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Articles 22 and 23 of Regulations 70 (1926 ed.), promulgated August 24, 1926, under the Revenue Act of 1926, are the same as Articles 22 and 23 of Regulations 68 set out above.

Articles 22 and 23 of Regulations 70 (1929 ed.), promulgated March 23, 1929, under the Revenue Act of 1926, as amended by the Revenue Act of 1928, are the same as Articles 22 and 23 of Regulations 68 set out above, except that the first sentence of Article 22 of Regulations 70 (1929 ed.) reads as follows:

The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

Treasury Decision 4248 (VII–2 Cumulative Bulletin 358–359), promulgated November 23, 1928, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved November 23, 1928.

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4294 (IX–2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last sentence of article 22 of Regulations 68, added thereto by Treasury Decision 4248, is amended to read as follows:

The statute extends to joint ownerships wherein the right of survivorship exists, re-

gardless of when such joint ownerships were created.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930.

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4295 (IX–2 Cumulative Bulletin 426), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 70 (1929 Edition) is hereby amended by substituting in lieu of the first sentence thereof the following:

The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930:

A. W. MELLON,
Secretary of the Treasury.

REGULATIONS UNDER ACTS PREVIOUS TO THE REVENUE ACT OF 1924

Articles 27 and 28 of Regulations 37 (Revised January, 1921), promulgated January 31, 1921, under the Revenue Act of 1918, and Articles 23 and 24 of Regulations 63, promulgated July 27, 1922, under the Revenue Act of 1921, are the same, so far as the present question is concerned, as Articles 22

and 23 of Regulations 68 set out above, *supra*, pp. 33–34. These Regulations have been twice amended by Treasury Decisions which are set out below.

Treasury Decision 3951 (VI–1 Cumulative Bulletin 314–315), promulgated December 29, 1926, provides:

> TREASURY DEPARTMENT,
> OFFICE OF COMMISSIONER
> OF INTERNAL REVENUE,
> *Washington, D. C.*
>
> *To Collectors of Internal Revenue and Others Concerned:*
>
> Article 27 of Regulations No. 37 (revised January, 1921), and article 23, Regulations No. 63, are hereby amended to read as follows:
>
> "*Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons and of estates by the entirety. This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purpose of administration. It does not include interests held as tenants in common where the interest of each tenant passes free from any right of survivorship.
>
> "The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a

bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship."

These amendments apply only to the estates of decedents who died prior to the effective date of the Revenue Act of 1924.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved December 29, 1926.

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4293 (IX–2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, as amended by Treasury Decision 3951, are hereby amended by striking out the following sentence:

"This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death."

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930:

A. W. MELLON,
Secretary of the Treasury.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1932.

J. H. Gwinn, Beneficiary of the Estate of M. A. Gwinn, Deceased, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 5, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

June —, 1915, J. H. Gwinn, the petitioner here, and his mother, Mrs. M. A. Gwinn, residents of California, acquired by equal contributions certain property, as joint tenants with the right of survivorship, which they continued to hold until her death, October 5, 1924. He is the beneficiary of the estate and in possession of its assets.

The Revenue Act approved June 2, 1924, c. 234, 43 Stat. 253, 304 (U. S. C., Title 26, Sec. 1094) provides—

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— . . .

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: . . .

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, aris-

ing, existing, exercised, or relinquished before or after the enactment of this Act."

When he appraised the gross estate of Mrs. Gwinn for taxation under the Act of 1294, the Commissioner of Internal Revenue included the value of one-half the property which she and her son had acquired as stated. This was challenged as error. The Board of Tax Appeals upheld the Commissioner and the Circuit Court of Appeals affirmed its order.

The petitioner maintains—

That the word "before" in Subdivision (h), Section 302, *supra*, should be construed as referring only to the period between June 2, 1924, and September 8, 1916, when the first of recent Federal estate tax statutes (39 Stat. 777) became effective.

That under the tenancy created in June, 1915, each party acquired immediate joint ownership in the whole property; that his interest therein then became completely vested and no change in title or transfer of interest occurred by reason of the co-tenant's death. No interest ceased or passed at the death. The Commissioner is attempting, arbitrarily, capriciously and in violation of the due process clause of the Fifth Amendment, to tax something created, transferred and vested in the survivor prior to the first (1916) Federal estate tax law.

The clear language of the 1924 statute repels the notion that it has no application to joint tenancies created prior to September 8, 1916. *Nichols* v. *Coolidge*, 274 U. S. 531. The contrary view is not aided (as claimed) by *Phillips* v. *Dime Trust & Safe Deposit Co.*, 284 U. S. 160.

The Estate of Gurnsey (1918), 177 Cal. 211, is relied upon to support the postulate that under the laws of California no novel tax can be laid on account of rights accruing to the survivor by an enactment subsequent to the creation of the joint tenancy. There the death occurred February 9, 1915. Claiming authority under the Act of 1913, the State Controller sought to collect an inheritance tax upon a bank deposit credited to the joint account of the decedent and another in April, 1911. The court declared the transfer to the joint account was complete and the title to the fund became vested in the joint tenants when the deposit was made. Also, "the rule on the subject is that the question of liability to inheritance taxes must be determined by the law in

force at the time the title vests in virtue of the transfer." And, the conclusion was that the law in force in 1911 "did not undertake to impose a tax upon the rights accruing to a surviving joint tenant upon the death of his co-tenant." The claim of the State Controller was accordingly rejected and the fund declared not liable to taxation under the Act of 1913.

This opinion recognizes that some rights accrue "to a surviving joint tenant upon the death of his co-tenant," and the possibility of taxation by reason of this fact. But it apparently affirms that under the rule approved in California liability for such taxation must be determined according to law in force when the co-tenancy is established.

To support its affirmation concerning this rule the court cited only *Hunt* v. *Wicht,* 174 Cal. 205. That cause grew out of an effort, after the grantor's death in 1913, to impose a tax under the statute of 1911 on account of the absolute transfer made in 1905 of a present title to real property subject only to a life estate. The ruling was that a tax based on that transaction could not be laid by an after enacted statute. There was no suggestion that the doctrine there accepted could have application if the imposition had relation only to circumstances which would arise in the future. But in no view could the supposed rule limit the power of Congress in respect of federal taxation.

In *Tyler* v. *United States,* 281 U. S. 497, 503, 504, where the question at issue was similar to the one now presented, this Court declared—

> "The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. . . .
>
> "At his [the co-tenant's] death, however, and because of it, she [the survivor] for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating

to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax."

Although the property here involved was held under a joint tenancy with the right of survivorship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution. Calif. Code Civ. Procedure, Sec. 752; *Green* v. *Skinner*, 185 Cal. 435; *Hilborn* v. *Soale*, 44 Cal. App. 115. The right to effect these changes in the estate was not terminated until the co-tenant's death. Cessation of this power after enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of definite accessions to the survivor's property rights. *Tyler* v. *United States*, *supra*. See *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

Nichols v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440, and *Coolidge* v. *Long*, 282 U. S. 582, are inapplicable. In them the rights of the survivors became finally and definitely fixed before the passage of the act—nothing was added as the result of death.

The judgment below must be affirmed.

Affirmed.